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CONVEYANCER'S NOTEBOOK

Editorial.—With this number our colleague Mr. D. C. L. Cree reaches thirty years in the editorial chair of this periodical. We very much regret that in the turmoil of war and impending peace we overlooked his silver wedding with the success of this venture, but we are happy to be able to record that at no time have we enjoyed a wider circulation than at present. During this long editorship there have been some strenuous moments both physically from the war and intellectually from the efforts of Parliament to reform our law of conveyancing and now "to revolutionise land tenures". Not only that, but the completion of the "encyclopædia", which was one of the primary objects of the old series, involved a radical alteration of policy with reference to the relation between journal and precedents. Despite these things *The Conveyancer* has continued to flourish and we are, therefore, sure that our subscribers would not wish the occasion to pass without offering our greetings and best wishes to the master hand. Conveyancing is such an esoteric art that it is not apt to develop the human virtues, but this journal owes very much to the sane, practical commonsense point of view of Mr. Cree and we would like to add a personal tribute of thanks for wise counsel in time of need.

H. P.

Registered Conveyancing.—In a written answer (H. C. Debates, vol. 474, col. 58) the Attorney-General stated that, though the work of the Land Registry was now up to date, the lack of trained

staff prevents a return to pre-war speed and the manpower situation precludes the recruitment of the additional staff required either fully to restore the pre-war position or enable the compulsory areas to be further extended. He also said that he could not contemplate in the immediate future substituting registration of title in Yorkshire for the present system of registration of deeds.

The framing of the answer seems to imply that the spirit is willing to extend the compulsory areas, but the flesh remains weak. No doubt this answer will give a good deal of satisfaction to many practitioners whose practice has involved little or no experience of registered conveyancing, and who very naturally do not wish to have yet the additional burden of mastering its practice added to their other troubles. The fact remains that registered conveyancing, from one cause or another, steadily advances. How long the "evil hour" will be postponed remains to be seen, and may possibly be affected by "cuts" in other civil service departments leaving free clerical labour not readily to be absorbed in industry. The Land Registry can after all be made to pay its own way without subsidy from the general taxpayer. In the meantime, however, breathing space remains.

Leasehold reform.—In another written answer (H. C. Debates, vol. 474, col. 59) the Attorney-General stated that the Government were deferring any decision until the final report of the Leasehold Committee which was expected within about a month. It would, therefore, appear again that no immediate change in the law threatens, but, if it has not appeared before we come out, we advise conveyancers to watch for the appearance of this Report which may recommend substantial alterations in the existing law.

Medical Partnerships.—Clause 6 of the Precedent on p. 408 of *The Conveyancer*, Vol. 14, No. 1, does not, perhaps, make it clear that the remuneration under the General Medical Services to be brought into the partnership by each partner is his net remuneration after deducting the practitioners' contribution under the Superannuation Regulations. Where this is intended it would be preferable to say "net remuneration after deduction of the contribution in respect of superannuation benefits", or alternatively, if this is intended, "gross remuneration without any deduction in respect of

contribution in respect of superannuation benefits ". Clause 3 of this Precedent provides for six months' notice of retirement to be given. This is considered reasonable in the circumstances contemplated. Inasmuch, however, as the Executive Committee can put in a nominee where a vacancy remains open for three months, it may in some cases lead to difficulties where the retiring partner is taking up a new post; and the length of notice is a matter for consideration in each case.

Town and Country Planning. A new General Development Order and Development Charge Applications Regulations, 1950 (SI 728/1950) have been issued in place of the existing Order and Regulations and they came into force on May 22, 1950. They contain as well as regulations for development charge applications also regulations for applications for planning permissions and directions concerning the register relating to applications for planning permission. They do *not* contain any exemptions from development charge, but the Minister announced in the House on June 13 that in the near future some new regulations would be brought out extending the exemptions for development charge.

As we understand the law, the effect of a General Development Order is to operate as a general planning permission, thereby rendering it unnecessary to obtain from the local planning authority any specific permission. Any development carried out in pursuance of the Order is not the less " development " for the purposes of the Act. Consequently, unless the development is already covered by Development Charge Exemption Regulations (see SI 1188/1948) it will still be necessary to pay a development charge where that is applicable. Where any doubt exists the wise course is to apply to the Central Land Board for a determination whether a charge is payable, on a form obtainable from the Board or authority with whom an application for planning permission may be lodged : Art. 2, Part II of SI 728/1950.

It is not possible to detail the changes in scope of the new General Development Order since they cover a wide field, extending over the general range of development, including dwelling-houses, shops, and industrial and agricultural uses. It may, however, be noted that garages are now included in the Order and so are gates, fences and walls abutting the highway, but these last are then limited to four feet in height. Attention should also be drawn to the conditions respectively attached to so many of the different kinds of development, such, for example, as that the

development may not project beyond the forwardmost part of the front of the *original* dwelling-house in Class I. We foresee that this kind of condition may lead to a good deal of trouble in small cases.

It is also to be noted that the Minister has announced that he does not propose any reduction of the level of development charge. He is satisfied that it does not affect development at the present time. On the other hand he contemplates some exemptions for the small man, such as exemption for development by use as business premises of part of a dwelling-house.

The Minister has also announced that some further "easement" can be made by amendment of the Use Classes Order. The effect of this would, apparently, operate to relieve changes of use from development charge.

No doubt these relaxations of control will be welcome to "developers". From the point of view of the property lawyer they mean further time occupied in study. It is vital that copies of these Orders should be kept at hand.

A couple of complaints have come to our ears that the journal is becoming too "academic". This is far from our purpose. It is never easy to decide when a detailed discussion of practical issues, and we scarcely deal in others, has become "academic". It is also difficult to avoid "unreadability" in some abstruse topics of our conveyancing law. Our purpose, however, is to provide discussion only on those points which occur in practice and only where it is felt that they need illumination. Some few articles may have dealt with more out of the way topics, but apart from intrinsic interest it was felt that this was a convenient corner to collect the material for practitioners as and when occasion arose to consult it. We should, however, always be grateful for any suggestions for enhancing the practical value of the journal. It is not always practicable to carry out suggestions but they always receive the most earnest attention.

Precedent.—We have received the following letter from a subscriber :—

In reference to the Precedent forms Nos. 1–4, I am wondering if any consideration has been given to the stamp duty payable in each case.

As you are aware, a lease for indefinite term which does not reserve a rent calculated in money attracts a stamp duty of £2. Is it not therefore an advantage for a nominal rent of say 1s. (if demanded) to be reserved in the case of service tenancies and tenancies at will, thereby reducing the stamp duty to 1s.?

The draftsman of the Precedent expresses agreement with the suggestion by the subscriber and we are indebted to him for bringing forward the point.

DISTRESS, POWERS OF ENTRY, QUIET ENJOYMENT AND DAMAGES

(*Contributed*)

It might be supposed that an application by a landlord under the Courts (Emergency Powers) Act, 1943, for leave to exercise the remedy of distress could be of little interest to a conveyancer; but it is hoped that those who are sufficiently persevering to read this article will agree that the outcome of one such application provides conveyancers with food for thought. In order to furnish the appropriate background it is proposed to consider what should happen (as distinct from what may happen) if the tenant, in order to avoid distress, claims that he has a right of set off. The answer for which full marks might be given by an examiner to an examinee is stated with practical unanimity in the textbooks to the following effect: " A right of set off does not take away either at law or in equity the landlord's right to distrain for the rent in full ". That particular statement is taken from Foa's *Landlord and Tenant* (7th ed., pp. 546, 547). It is not proposed to consider all of the authorities cited in support of that statement, either in that work or elsewhere; but reference may be made to the following points. In the course of his judgment in *Townrow* v. *Benson* (1818), 3 Madd. 203 the learned Vice-Chancellor said, " The tenant here claims to set off a legal demand against the distress of his landlord. The policy of the law does not permit a set off against a distress for rent; and a Court of Equity must follow the law, and cannot relieve against the rule of law that the claim to set off is founded on a legal demand. It is not necessary to consider how the case might be if the tenant had a counter-demand, not at law but in equity ". In *Pratt* v. *Keith* (1864), 33 L.J.Ch. 528, a replevin case, the tenant attempted unsuccessfully to set off a private debt due from his landlord, in order to prevent distraint. Another important case is that of *Absolon* v. *Knight* (1743), Bull. N. P. 181, also a case of replevin. The tenant argued that there was on balance, more due to him from the landlord than the amount of the rent. The judge refused the evidence, and upon motion for a new trial it was ruled that the statute 2 Geo. 2 did not extend to the case of distress (so as to allow such a set off), distress being a remedy without suit.

Agreed Deductions from Rent

On the other hand, it has not been doubted (at least for more than a century) that if a landlord agrees with his tenant that the tenant shall be entitled to deduct from the rent certain agreed amounts, the result is to extinguish *pro tanto* the tenant's liability in respect of rent, and thus to prohibit distress for the amount in question. The same is true of payments to a prior incumbrancer or of ground rent to the superior landlord : see *Laycock* v. *Tuffnell* (1787), 2 Chitty 531 (footnote); and *Wilson* v. *Davenport* (1833), 5 C. & P. 531, and in relation to deductions authorised by statute.

In respect of such items a landlord is at risk if he distrains at a time when no rent is due, and must face the pains and penalties which ensue.

The Case of A *v.* B

In the case of the application above mentioned, and in which the landlord was seeking leave to distrain, no such payments had been made on behalf of the landlord nor had the landlord agreed, as alleged by the tenant, that the tenant should be entitled to make any deduction from the rent payable by him, nor was any evidence whatever tendered to show that the tenant was unable to pay the rent in question by reason of circumstances connected with the war. In point of fact it appears to be most probable that the tenant was quite able to pay the rent in full. Nevertheless, not only did the landlord fail to obtain leave to distrain but the following somewhat startling rulings were given by the Master who dealt with the matter by directing an issue to be tried, namely, whether any rent was due: —

(1) That a claim in respect of damages for breach of a covenant for quiet enjoyment can be set off against a claim for rent so as to extinguish it in whole or *pro tanto*.

(2) That the standard power of entry to effect repairs if accompanied by the usual covenant for quiet enjoyment affords no answer to a claim for damages under such a covenant; but is effective only as authorising the landlord to effect repairs if he can do so without causing interference with the enjoyment by the tenant of the demised premises.

(3) That a letter from a landlord's surveyor stating what work has to be done and that the most expeditious method of dealing with the work will be for the tenant to store his furniture in two of his rooms and vacate the rest of the premises, constitutes an express request by the landlord to

the tenant to go out notwithstanding the fact that the landlord has previously advised the tenant that he cannot and does not require the tenant to vacate.

(4) That notwithstanding the fact that the tenant has expressly pleaded that he had agreed to go out, and notwithstanding the existence of a power of entry to repair, there is a breach of the covenant for quiet enjoyment if in the circumstances mentioned in paragraph (3) above the tenant, without further request, quits the premises to allow the work to proceed.

(5) That a breach of a covenant for quiet enjoyment suspends the rent (cf. (1) above).

(6) That notwithstanding the fact that some rent was due before the tenant vacated the premises to permit entry to effect repairs the tenant could resist the claim for rent both as to that rent and rent subsequently accruing due during the continuance of the breach of the covenant for quiet enjoyment.

(7) That in assessing damages for such a breach of covenant :

(a) The landlord must pay for the accommodation of an adult son of the tenant normally residing with him, such son being incapable, owing to disability, of earning his own living, notwithstanding the fact that there is no evidence that the landlord had knowledge of such incapacity.

(b) That despite the fact that the tenant was under covenant with the landlord to pay the rates, and therefore saved a substantial sum when he vacated the premises, no credit is to be given to the landlord in respect of that saving. In other words, it is a windfall for the tenant.

In view of the personal interest of the writer in the application last mentioned, it is proposed in the remainder of this article to limit so far as possible further reference to it and to leave the reader to judge for himself whether they are correct after he has considered the authorities mentioned below, and some of which were unfortunately not mentioned to the Master by counsel. When it is necessary to refer to the above-mentioned case it will be referred to as *A* v. *B*.

SET OFF

This is not the place in which to deal fully with the question of set off; but in relation to distress the question whether any rent is due is clearly material. Since the rule concerning the right of set

off was unsettled by the *dicta* of Channell, J., in *Bankes* v. *Jarvis*, [1903] 1 K.B. 549, it is fair to say that the exact limits of the right of set off have never been quite clear; but that does not mean that decided cases are not binding. According to the *White Book* (1948, p. 357)—

(a) "A set off is a cross-claim for a liquidated amount, *i.e.*, debts due for liquidated sums or demands which can be ascertained with certainty at the time of pleading". (It is submitted that damages for breach of a covenant for quiet enjoyment cannot be so ascertained and that they are not "liquidated sums".)

(b) The *dicta* in *Bankes* v. *Jarvis*, *supra*, are at variance with decisions and *dicta* in numerous other cases which state that no new right of set off has been created.

(c) In *Hart* v. *Rogers*, [1916] 1 K.B. 646, a claim for damages for breach of covenant was not allowed to be set off against a claim for rent.

In *Halsbury* (2nd ed., Vol. 29, p. 498) it is stated that a tenant cannot set off against a claim for rent a claim in damages for a breach of covenant by the landlord. It is true that there may be set against the passage last mentioned—

(a) The statement in the same work (Vol. 20, p. 170) that where a lessor brings an action for rent the lessee has a right to set off or *set up by way of counterclaim* any right or claim whether it sounds in damages or not, and

(b) Footnote (*o*) on the same page where it is said that formerly a lessee could only set off a legal demand and not a claim for damages for breach of covenant, and the reader is referred to a discussion of the effect of R. S. C. Order 19, rule 3, in Vol. 29. Apart from the passage in that volume already mentioned above (negativing the right of set off of damages for breach of covenant against rent), it is hardly possible that the editors of Volume 20 meant to assert that such a right of set off existed, as at p. 150 of that volume it is expressly stated that if a lessor has failed in the performance of a stipulation on his part the lessee *remains liable for the rent* although he may be entitled to damages for breach of covenant, citing *Hart* v. *Rogers*, *supra*. Any suggestion that R. S. C. Order 19, rule 3, is now regarded as permitting a set off in such a case appears to be answered by the observations in footnote (*r*) to p. 488 of *Halsbury* Vol. 29, concerning that rule. No support for the proposition that damages for breach of a lessor's covenant can be

set off against rent is to be found in any judicial decision, though there is authority for the contrary view. The most modern case of *Cruse* v. *Mount*, [1933] Ch. 279, is mentioned later; but in this section it is proposed to deal with the earlier authorities.

There is an old case of *Waters* v. *Weigall* (1795), 2 Anst. 575 where a tenant had expended certain moneys on urgent repairs. From the headnote it might appear that he was entitled to do so; but when the judgment is examined it will be seen that Chief Baron Macdonald merely said that *if the tenant was right* in expending the sum in repairs for the landlord he could set it off against rent as though it were put to the use of the landlord but that *if not* his ground of relief was destroyed both at law and in equity. At law later in *Weigall* v. *Waters* (1795), 6 T. R. 488, when the tenant attempted to set off the costs of the repairs against rent, he was unsuccessful. It was held that uncertain damages could not be set off against rent, and it was pointed out that there was no covenant by the landlord to repair. Even if there had been, as it appears that the landlord had no notice of the want of repair, the tenant would have been in no better position.

Surplice v. *Farnsworth* (1844), 7 M. & G. 576, is authority for the proposition that a claim for damages against a lessor for failure to repair according to his covenant, cannot be set off against a claim for rent. It was there laid down that if by the lessor's neglect to perform his covenant to repair the premises become useless, the rent is not suspended, but the tenant has a remedy for breach of the covenant: see *Halsbury*, Vol. 20, 2nd ed., p. 78.

Following that decision in a case where premises had become unfit for occupation owing to failure to repair the roof of a block of flats, Scrutton, J., said that he was unable to see any answer to the whole claim for rent, *Hart* v. *Rogers*, [1916] 1 K. B. 646. There was in that case no covenant by the landlord to repair the roof, but basing himself on *dicta* in earlier decisions the learned judge came reluctantly to the conclusion that quite apart from express covenant the landlord of a block of flats was under an absolute duty *vis-a-vis* the occupiers to keep the parts of the building which remained in his control in repair, and said that otherwise he would have given judgment for the landlord also on the counterclaim as there was no evidence of negligence on the part of the landlord. Later in *Cockburn* v. *Smith*, [1924] 2 K. B. 119, as a member of the Court of Appeal, he had the pleasure of overruling his own earlier reluctant decision on this point; and it is now settled that the duty above mentioned is not absolute but is merely a duty

to use reasonable care to ensure that such parts are kept in repair. The materiality of this point is that in *A* v. *B* the landlord A was under a similar liability, and that fact is to be borne in mind when we come to the decision in *Saner* v. *Bilton*, *infra*.

No Alternative Accommodation for Lessee

The case of *Green* v. *Eales* (1841), 2 Q. B. 225, lays down the rule that if owing to the execution of repairs by a landlord pursuant to a covenant in the lease the tenant is compelled to take other premises, he cannot recover from the landlord rent, taxes or other outgoings in respect of those other premises. The judgment proceeded on the footing that the covenant to repair did not imply any obligation on the part of the landlord to furnish the tenant with another house, any more than he would have been liable to do so if the premises had been burnt down. The limits of this proposition must, however, be observed. Once the landlord was made aware of the want of repair it would be his duty to put in hand the necessary repairs without delay, and failure to do so might render him liable to pay the items above mentioned in respect of the additional period for which the tenant was kept out of the premises by reason of the landlord's delay in commencing the repairs (*ibid.*), or no doubt, in proceeding with them to completion.

No attempt was made in *Green* v. *Eales*, *supra*, to claim damages for breach of the covenant for quiet enjoyment. It seems probable that a covenant for quiet enjoyment would have been inserted in the lease, but having regard to the fact that such a covenant would be implied by law (see *Budd-Scott* v. *Daniel*, [1902] 2 K. B. 351) it is not really material whether such a covenant was contained in the lease.

It would, however, appear from another decision that no useful purpose would have been served by a claim for damages for breach of covenant for quiet enjoyment by the tenant in *Green* v. *Eales*.

That decision is *Saner* v. *Bilton* (1878), 7 Ch. D. 815, where the lessor had covenanted in a lease that he would during the term keep the main walls and main timbers in good repair and condition. After the grant of the lease a supporting beam broke, and later the external walls sank and bulged. The lessor expended a large sum in repairing the property. One question which arose in the action which ensued was whether there should be an abatement of rent under a clause permitting cesser or abatement of rent in the case of destruction or damage "by fire, flood, storm, tempest or other inevitable accident". It was held that no abatement of

rent could be claimed by the lessee in respect of the deprivation of use of the whole or a part of the premises during the period of repair, because the words " or other inevitable accident " must be construed *ejusdem generis* with " fire, flood, tempest ", etc., and although the occurrence was not avoidable so far as the tenant was concerned, the learned Judge considered that the clause did not apply to " anything arising from the acts or defaults of either of the contracting parties ". Here, the " accident " might have been avoided if the building had been properly constructed, so that it was not " inevitable ", in his opinion, within the meaning of the clause, when restricted by the *ejusdem generis* rule.

Power of Entry

No point of that kind arose in *A* v. *B*; but the other issue involved in *Saner* v. *Bilton*, *supra*, is distinctly relevant, and in order to make clear its relevance it is desirable to explain that the Tenancy Agreement between A and B contained (*inter alia*) the following provisions :—

(1) A covenant by the tenant B to permit the landlord A, and the tenants or owners of premises adjoining those comprised in the Tenancy Agreement to execute repairs or other works to the premises thereby let or to such adjoining premises;

(2) The usual limited covenant by the landlord A for quiet enjoyment.

In consequence of the works to be carried out by A, the tenant B concluded quite reasonably that life would be extremely uncomfortable in the flat. A had informed B that he had no power to require B to remove from the flat and had intimated that conditions would not be pleasant, but that the tenant must make his own decision. Further, A's architect had advised B that the work could be performed most expeditiously if B would store his furniture in two rooms in the flat, which clearly involved the substantial vacation of the flat. B, having arranged to occupy a certain furnished flat mentioned to him by A, then vacated the flat leaving two rooms occupied by his furniture. The work took some months to complete and in the proceedings B claimed damages for quiet enjoyment. A pleaded the power of entry. It should be noted that there was not in *A* v. *B* (as there was in *Saner* v. *Bilton*, *supra*) a covenant by the landlord A to effect repairs. In *Saner's Case*, *supra*, Fry, J., referred to the lessor's covenant to repair and said that he had construed that covenant to mean that the lessor

should put the premises into good condition if necessary, and added :

> " In my judgment that covenant carries with it *an implied licence to the lessor to enter upon the premises of the lessee, and to occupy them for a reasonable time* to do that which he has covenanted to do, and which he has not only covenanted to do, but which he has a right to do, because he has an interest in being allowed to perform his covenant."

Quiet Enjoyment

After rejecting the suggestion that the time occupied was unreasonable, Fry, J., proceeded as follows :

> " It is further said that the construction of the covenant [*i.e.*, to repair] as carrying with it an implied licence to enter, is inconsistent with the lessor's covenant for quiet enjoyment. I do not think it is, and for this reason, that *the covenant for quiet enjoyment, if read as absolutely unqualified, is as inconsistent with an entry for a single moment as it is for a single month or year. The mere sending a man in to do the repairs would be a technical breach of the covenant if it was construed as absolute and unconditional. But that, in my opinion, is a thing which the plaintiff has a clear right to do, for otherwise he could not do that which he has covenanted to do. Therefore I think the covenant for quiet enjoyment must be read as subject to the license which I have held to be implied in the covenant to repair.*"

Now, it was laid down by the Court of Appeal in *Cockburn* v. *Smith*, [1924] 2 K. B. 119, that where the owner of a block of flats lets a top floor flat, but keeps the roof in his own possession and control, he is bound (apart from any covenant) to take reasonable care to remedy defects of which he has notice and which are a danger to the tenant of the flat: and that this duty is not affected by the fact that the landlord has agreed in the tenancy agreement to keep certain other parts of the building (common staircases, etc.) in good repair, whilst entering into no covenant to repair the roof.

Hence, although in *A* v. *B* A had entered into no covenant to effect repairs the obligation of A to repair the roof in accordance with *Cockburn* v. *Smith*, *supra*, was perfectly clear, as his architect had advised that the roof was in a dangerous condition.

Upon the authority of the words of Fry, J., in *Saner* v. *Bilton*, *supra*, it is submitted that no distinction can be drawn between " slight " and " substantial " interference in relation to the exercise of a power of entry to effect repairs and that if such a power

exists the fact that the repairs involve the vacation by the tenant of the demised premises affords no right of action to him on the ground of breach of the covenant for quiet enjoyment.

EVICTION

There is some ground for saying that eviction, like so many other things, is not what it used to be. It is certainly not synonymous with breach of a covenant for quiet enjoyment; but in the matter of pleading, the position at the present day is very different, as appears from the following passage taken from the judgment of Jervis, C.J., in *Upton* v. *Townend*, 25 L. J. C. P. 51.

> "The word 'eviction' has in latter times been understood to mean what formerly it was not intended to express. Formerly it meant what was expressed by the language of Pleading, 'evicted, expelled, removed, and put out,'—describing the different modes in which it might take place. 'Eviction,' from *evincere*, to evict or dispossess by course of law, was used originally when the person having the permanent title asserted it and expelled his tenant. But that sort of eviction is not absolutely necessary in order to operate as a suspension of the rent, and the word is now used when that has been done which deprives the tenant of the enjoyment of the premises, and the rent is therefore suspended, and the right of the landlord to recover it is gone. The word 'eviction' has come to have a popular meaning, and to be applied to every kind of expulsion in fact. Now getting rid of the old notion of an eviction it may be taken to mean, not a mere trespass without anything more—because though every eviction implies a trespass, every trespass does not amount to an eviction,—but something of a more permanent character done by the landlord with the intention of depriving the tenant of the enjoyment of the whole or part of the demised premises. If that be shown the eviction may be in various ways."

However, reference to the full judgments in *Upton* v. *Townend*, *supra*, will show that nothing said by any of the learned judges suggested that a temporary trespass would constitute eviction. The eviction there was clearly intended to be permanent.

Moreover, there is no authority, so far as I am aware, for saying that eviction in law can occur (1) when the tenant quits quite voluntarily, or (2) when the work is done pursuant to an authority contained in the lease or tenancy agreement.

Suspension of Rent

There is no doubt that when eviction occurs the result is to suspend the rent; but there is good authority for the view that the tenant "remains liable for rent accrued due before the eviction and hence in resisting a claim for rent he must show that it accrued due after the eviction", *Halsbury* (2nd ed.), Vol. 20, p. 175; see footnote (*m*) *ibid.*, and the cases there cited.

It will be recalled that in *A* v. *B* it was held that the effect of a breach of covenant for quiet enjoyment was to suspend the rent. For that proposition the decision in *Morrison* v. *Chadwick*, 7 C. B. 266 was cited. It will, however, be found that that case was one of eviction and contains no reference to breach of covenant for quiet enjoyment. Apart from the authorities above mentioned, which establish the fact that a breach of covenant for quiet enjoyment does not cause a suspension of rent, reference may be made to the case of *Cruse* v. *Mount*, [1933] Ch. 279, in which it was held :—

(1) That there is no implied condition in a lease of an unfurnished flat that it is reasonably fit for occupation.

(2) That by writing to the tenant that repairs were essential and *would have to be carried out in the absence of the tenant* and his household, and thereby causing the tenant to leave the flat, the landlord, although not actually evicting the tenant, had broken his covenant for quiet enjoyment. [Be it noted that there is nothing in the report in *Cruse* v. *Mount* to indicate that any power of entry to repair was contained in the lease.]

(3) That the landlord succeeded in his counterclaim for the rent which seems to be quite incompatible with the proposition that a breach of covenant for quiet enjoyment suspends the rent.

The Order in *A* v. *B*

The order made by the Master declared that at the date of the Originating Summons seeking leave to distrain there was "no rent due" to the landlord (A) as at that date A "was indebted to the respondent (B) in the sum of £X as damages for breach of covenant for quiet enjoyment". Another strange feature of this curious case is that this "official" finding of damages was entirely contrary to the arrangement between the parties, and to the Master's statement as recorded in that arrangement, namely that he could not make any official finding of damages.

It remains to consider the matter of damages.

Measure of Damages

In *A* v. *B* the tenant B had delivered to A an account showing on the one side the amount of the rent claimed by A and on the other side he had set off various items. It is not necessary to deal with all of them but two are of special interest.

(a) *Claim in respect of separate accommodation for adult son.*

The son in question was over twenty-one but was incapacitated. It might seem to a landlord, but perhaps not to a tenant, that upon breach of a covenant for quiet enjoyment the landlord should not be required to pay for the accommodation of an adult resident with the tenant, and for whom the tenant was under no responsibility. Thus if two of the tenant's nephews or nieces were staying with him at the material time as non-paying guests it would possibly not occur to the landlord that the tenant was entitled to find them other accommodation at his expense, and to charge the landlord with the sum thus expended. It is, of course, a question whether such an expenditure would be within the reasonable contemplation of the parties. Possibly a son who is in indifferent health is in a different category, but if the landlord is not aware of that fact is he liable to pay for the expense of the son's accommodation? In *A* v. *B* it was held that he was so liable.

(b) *Rates.*

B also claimed a sum in respect of rates paid by him during the period whilst he was out of possession of the flat in respect of the use of two of the rooms of the flat for the storage of his furniture. The interesting feature of this point is that B was liable under his tenancy agreement to pay the rates. Suppose, therefore, that the rates for the material period were £45 and the amount charged for rates as above mentioned was £25, it is clear that B in consequence of his removal from the flat has made a saving of £20. Whilst these are not the exact figures in *A* v. *B*, it can be said that the question whether B was bound to give credit in his account with his landlord A was of vital importance, because if B was not so bound the balance of the account was in favour of B and (upon the view which the Master took), there was in that case no rent due to A. Conveyancers will at once see the significance of the point involved. If the rent had been inclusive of rates there is no doubt that the account prepared by the tenant would have included the amount of the rent which would, of course, have increased the credit in favour of the landlord, on the figures taken above, by £45. The tenant would not have been concerned with the rates, *and therefore*

could not have included any item of expenditure upon rates in his contra account. Hence, on the figures assumed above the difference would be as follows:—

(i) Inclusive rent.—No credit or debit in account. Landlord saves on the rates £20 *which will go towards the damages.*

(ii) Exclusive rent.—No credit to landlord in account. Tenant claims £20.

It will be seen that the difference between (i) and (ii) is not £20 but £40. (If we are striking a balance and you debit me with a shilling instead of crediting me with it, I am two shillings out of pocket, as most articled clerks learn at a very early stage when dealing with apportionments on completion !)

It may be objected that it should make no difference in principle whether the rent is inclusive or exclusive of rates and that in case (i) the appropriate adjustment should be made. I can only say that in *A* v. *B* the Master refused to accept that view, despite the argument of counsel. At first he proposed to allow the tenant not merely to retain the full benefit of freedom from the rates which he would, but, as A considered, to heap Pelion on Ossa by allowing B to recover from A the reduced amount of rates so that the tenant would not merely have gained the benefit of the difference between the full amount of the rates and the reduced amount paid by him (which would seem to have been far too much in any case) but would have been put in the happy position (on the figures here given) of being completely exempted from the payment of rates *as well as* recovering the whole of the items of additional expenditure incurred by reason of the loss of use of his flat and furniture. Subsequently the Master struck out the amount of the reduced rates paid by the tenant from the items of expenditure claimed by the tenant, thus giving to the tenant (a) the amount of the loss suffered by him and (b) an entirely undeserved bonus consisting of the difference between the full amount of the rates and the reduced sum in fact paid by him. As the net result was to show a very small balance in the tenant's favour he was *prima facie* entitled to his costs. In this respect, however, the wind was tempered to the shorn landlord, as the Master decided to give to the tenant only one half of his costs, having mentioned that the landlord had made strenuous efforts to settle the matter and had offered to the tenant a certain sum, which was in fact about two-thirds of the amount allowed to the tenant by the Court.

The Master made no order on the summons for leave to distrain, but suggested that it should be withdrawn. Whether he realised that a claim for damages for breach of covenant

could not be any answer to an application for leave under the Courts (Emergency Powers) Act, 1943, or whether he would in fact have dismissed the application if pressed to deal with it, cannot therefore, be known. It would have been interesting to have had the benefit of the view of the Divisional Court upon appeal; but the matter was in fact settled upon agreed terms in consideration of the landlord A refraining from giving notice of appeal.

The conclusion to be drawn by conveyancers from the curious happenings in *A* v. *B* is a matter for conveyancers to decide. Some may consider that the Master's view concerning the right of set off, and the ineffectiveness of the common form power of entry to effect repairs when read with the common form covenant for quiet enjoyment, and his view that the rent is suspended by breach of a covenant for quiet enjoyment, are all so obviously contrary to judicial authority that no change of wording in such a power or in the usual covenant for quiet enjoyment is necessary. Others may conclude that it cannot be wrong to strengthen such powers and/or to qualify such covenants in order that no landlord for whom they act may have an experience resembling that of A.

SERVICE OCCUPANCY AND THE TRUCK ACTS

By F. E. Mostyn, LL.B., Solicitor

In his article " Service Occupancy " in the March issue of *The Conveyancer*, Mr. K. F. Simpson raises at least as many problems as he endeavours to solve. He states :

" If the employee is to occupy (premises of his employer) on the terms that no rent shall be payable, or that it is *paid in the shape of services* performed by the tenant, the matter is comparatively straightforward and the precedent headed ' Occupational licence without monetary rent ' on p. 402 will be appropriate. If, however, a monetary rent is to be deducted from the employee's wages, it becomes necessary to ensure that such deduction is not contrary to the Truck Acts, 1831–1940 ".

It would seem that Mr. Simpson draws these conclusions because he is primarily concerned to prevent a service occupancy from being construed as a service tenancy as occurred in the case of *The Three D.'s Co., Ltd.* v. *Burrow* which he cites. The practical distinction between a service occupancy and a service tenancy, as the *Law Journal* (Vol. XCIX, No. 4345, of May 6, 1949) commenting on the *Three D.'s Case* pointed out, is that the Rent Acts do not apply in the former case. Mr. Simpson therefore approaches his subject from the point of view of the employer who wishes to recover immediate possession of the premises at the end of his employee's contract of service and accordingly is chiefly concerned with the question of rent.

I would suggest, however, that insufficient attention has been paid to the point of view of the other party to the contract, namely, the employee who occupies the premises and that a consideration at least as important as rent is that of wages.

Section 1, Truck Act, 1831 (as amended), enacts that in contracts for the employment of workmen, wages must be made payable in current coin of the realm and not otherwise. Section 3 states that all wages must actually be paid to the workman in coin.

Section 25 defines " wages " as " any money *or other thing* had or contracted *to be paid, delivered* or *given* as a recompense, reward or remuneration for any labour done or to be done whether within a certain time or to a certain amount, or for a time or an amount uncertain ". The same section in effect enacts that no contract for

(or payment of) *wages in kind* by means of *goods or services* shall be valid since it ousts " any agreement, understanding, device, contrivance, collusion, or arrangement whatsoever *on the subject of wages*, whether written or oral, whether direct or indirect, to which the employer and workman are parties or are assenting, or by which they are mutually bound to each other, or whereby either of them shall have endeavoured to impose *an obligation* on the other of them ".

If an employer gives his employee (being a workman) a house rent free he will, it is submitted, be hard put to prove that this arrangement is otherwise than " *a recompense, reward or remuneration for . . . labour* " within section 25. If X the workman is given a house to live in rent free and monetary wages of say £5 a week, he will if he thinks about it, without doubt regard his contract of employment as providing for *payment in money and in kind.* It is suggested that this is the only reasonable construction that could be placed on such a contract. And such contracts are declared illegal, null and void by the Truck Act, 1831, which provides criminal penalties for its breach (section 9) and enables the workman to recover from the employer by civil action the *value of the wages paid in kind* (section 4) up to a period of six years (Limitation Act, 1939).

Pratt v. *Cook*, [1940] A. C. 437 is, it is submitted, very much in point. In that case the appellant had been employed as a packer by the respondents and by his contract of service was paid a wage of 53s. a week plus the provision of dinners and teas valued at 10s. a week. He sued to recover the value of these meals alleging that they were part of his wages which had not been paid in cash. He recovered. It was held that the contract had contravened section 1, Truck Act, 1831. The respondents would have been protected had they agreed to pay him a weekly wage of 63s. and then deducted 10s. a week in respect of the food, provided that the workman had signed a written agreement in respect of such deduction under section 23 of the Act.

The ratio of this decision was that the employers had paid Pratt wages in money and kind, which is prohibited by the Act. Had there been a contract for payment of wages in money alone and then a written agreement under section 23 providing for a deduction for food, Pratt would have had no cause of action.

The result would have been similar in *Cameron* v. *Royal London Ophthalmic Hospital*, [1941] 1 K. B. 350, had Cameron, who had been employed as a stoker by the defendants, and sued for the value of board, lodging and laundry provided by them as part of

his wages, been held to have been a " workman ". He was, in fact, held to have been a domestic servant and thereby outside the protection of the Act.

The recent Canadian case of *Arnett* v. *Allouette Peat Products, Ltd.*, [1942] 1 W. W. R. 33 decided that payment of wages partly by means of shares was a violation of the Act and there is also considerable English authority for this proposition.

In this case Arnett, who was secretary and a director of the respondent company and had also been engaged in manual labour in the production of peat, was held to have been a " workman " within the meaning of the Act. " Who is and who is not a workman? " are fascinating questions and any discussion of the Truck Acts which does not consider them is necessarily incomplete, but there is no space here for further dalliance.

To return then to the remarks quoted at the beginning of this article, it is suggested that Mr. Simpson's views do not adequately describe the position, so far at least as the Truck Act, 1831, is concerned. If the employee is to occupy on the terms that no rent shall be payable or that it shall be paid by means of services, no doubt by using the precedent headed " Occupational licence without monetary rent " on p. 402, the Rent Acts will not apply and the matter will, from this point of view, be as straightforward as Mr. Simpson asserts. But from the other aspect one finds that there is a *contract to pay wages* partly in kind, whether *expressly*, *i.e.*, by *performance of services*, or by *implication*, *i.e.*, where it is stated that there shall be no monetary rent, and in either case there is a clear violation of the Truck Act. Moreover, a " licence " is, as Mr. Simpson states, not a " demise " and if advantage is to be taken of section 23 of the Truck Act, there must be a demise.

Again in the quotation above mentioned, it was stated that if a monetary rent was to be deducted from the employee's wages, it became necessary to ensure that such deduction was not contrary to the Truck Act. Nothing could be simpler than so to ensure, by means of a written agreement in respect of the deduction, signed by the employee as provided by section 23. It is, perhaps, worth mention that although section 23 enables deductions to be made from wages in respect of various matters, *e.g.*, fuel, tools for miners, provender for animals, and specifies that such deductions shall not exceed their real and true value, no such limitation is placed upon the amount of rent chargeable by the employer. In theory at least then, an employer can charge what rent he pleases and so long as there is a written and signed agreement, he may deduct it from wages.

Whilst Forms 2 and 3 on pages 402 and 403 may be appropriate for the purposes of the Rent Acts, they are most inappropriate for those of the Truck Act, 1831. There is patently a dilemma. To avoid the embrace of the Rent Acts, the employer should grant only a licence to occupy the premises. To satisfy the Truck Act, there must be a demise and an agreement in writing enabling the employer to make a deduction from the employee's wages for rent. If the choice has to be made between the application of the Rent Acts and the Truck Act, it is perhaps pertinent to remark that an employee suing for the value of up to six years payment in kind in respect of the occupation of a rent-free house, will have a very substantial claim.

What has been said above applies only to " workmen " (not including agricultural labourers as to whom there are special provisions in the Truck Acts) as defined by section 10, Employers and Workmen Act, 1875. The Truck Acts have no application to domestic servants or employees other than workmen and with regard to such employees, legal ingenuity may apply itself without fear of diversion to the control of the Rent Acts.

Mr. Simpson replies as follows :—

The gist of Mr. Mostyn's argument appears to be that the provision of a rent-free house by an employer in addition to the payment of an agreed monetary wage amounts to the payment of wages in kind, thereby contravening sections 1 and 3 of the Truck Act, 1831. I do not agree that this is so where the contract clearly excludes such an intention, as section 1 in effect enacts that *wages* shall be paid in current coin of the realm in respect of any *contract* for the hiring of any artificer or the performance by any artificer of any labour, and section 3 declares to be illegal payment of wages *in goods* or otherwise than in current coin of the realm.

Section 25 defines the meaning of the word " contract " as used in section 1 to include any agreement, etc., *on the subject of wages*, and defines " wages " as " any money or other thing ".

In my view, therefore, the contracts with which the Truck Acts are concerned are those which deal with the wages of the employee, and the intention of the Acts is to prevent payment of the *agreed contractual wage* of the employee otherwise than in current coin of the realm.

The question therefore to be decided is whether a licence granted to an employee permitting him to live in a house without payment of rent amounts to a contract on the subject of wages within the meaning of the Truck Acts, and it is very material to ascertain exactly what were the precise terms of the contract made between

employer and employee, as the facts in *Pratt* v. *Cook, Son & Co.*, [1938] 1 All E. R. 556, 557, show that the sum of 10s. was specifically agreed to be the value of the food provided by the employer as part of the terms of employment and was part of the contract on the subject of wages. In the House of Lords decision in this case Lord Wright stated as follows :—

> " It is true that in the Act there is nothing to prevent an employer from supplying goods or other benefits to a workman and charging for them, so long as sections 1 and 3 are not infringed—that is, so long as the *contract wages* are in current coin, and so long as sections 2, 5 and 6 are not infringed ". ([1940] 1 All E. R., p. 419.)

I submit that the licence to occupy a dwelling-house without payment of rent is something which an employee is permitted to accept or refuse independently of the amount of wage which it is agreed shall be paid to him, and if this is clearly stated to him at the time of his engagement there should be no doubt in his mind that he is being paid his full wage plus a right either to occupy a dwelling-house conveniently situated for his work without payment of rent or live elsewhere. In other words, the occupation of the dwelling-house is not a condition of his employment and there is no compulsion to reside therein. It is an option of which he can avail himself if he chooses, and I see nothing in the precedent on page 402 which can be said to impose any obligation of residence on the employee.

If the contractual agreement between employer and employee is such that the employee's wages are X pounds and these are paid in full in current coin of the realm, then it is difficult to see how any other agreement which has no reference to wages, that is, money or other thing, and is not a contract for hiring or the performance of any labour, can be said to amount to payment in kind. I suggest that " money or other thing " in section 25 should be construed *ejusdem generis* and, further, that the words " paid, delivered or given " in section 25 indicate something tangible rather than the intangible option to occupy a particular dwelling-house rent free.

Mr. Mostyn appears to suggest that the Court in such cases would read into the contract between the parties, *whatever their expressed intention*, a provision that there must be added to whatever amount is agreed as monetary wages a further unascertained sum in respect of the non-payment of any extra thing given to or provided for the employee gratuitously by the employer.

The consequence would be that any gift or concession not specifically authorised by section 23 of the Truck Act, 1831, given by an

employer to a manual worker runs the risk of being regarded as a payment in kind and therefore contrary to the Truck Acts. Examples of such concessions frequently given to workpeople are the provision of free transport by firms for their employees between their homes and places of work, free seats to employees by cinema and theatre proprietors, and many others.

If this is the result of the decision in *Pratt* v. *Cook, Son & Co.*, and the correct interpretation of the Truck Acts, which I doubt, then many employers at the present time are in jeopardy of legal proceedings being instituted against them by employees who have enjoyed the benefit of gifts or concessions of various kinds.

It is significant that if this is the position resulting from the decision of the House of Lords in *Pratt* v. *Cook, Son & Co.*, no amending legislation was included in the Truck Act, 1940, to rectify what is obviously a defect in the law.

COMPULSORY REDEMPTION OF LAND TAX

FINANCE ACT, 1949, ss. 39–45 and SI 1950, No. 268

By H. Major Allen, Barrister-at-Law

The 1949 Finance Act foreshadows the eventual disappearance of the Land Tax—a disappearance which few but antiquarians will regret. Apart from provisions designed to stabilise the annual charge and to discontinue the collection of trivial sums, the Act contains in sections 39 to 45 a scheme for enforcing compulsory redemption. In brief, redemption is to take place when the ownership of the charged land changes hands by sale, long lease or death. Where the owner is a corporation, which cannot die, or a charitable or public trust, redemption is to be enforced on January 1, 1954.

Liability to redemption.

Liability to compulsory redemption arises on the happening on or after April 1, 1950, of any one of five events (section 39 (1)). In all cases, it is by reference to the "relevant interest" in the property that the events are determined. The "relevant interest" is defined in section 44 (1) (*e*) as meaning either the legal estate in fee simple, or where on April 1, 1950, the property is comprised in a lease having not less than fifty years unexpired, the term of that lease. If there is more than one lease, that one on which the others are reversionary forms the relevant interest.

The five determining events are as follows :—

(a) Where Crown property is occupied by some other person.

Crown property is defined as meaning property the relevant interest in which belongs to His Majesty in right of the Crown, or to the Duchy of Cornwall, or to a Government Department, or is held in trust for His Majesty for the purposes of a Government Department.

(b) Where the "relevant interest" is disposed of or a lease for twenty-one years or more is granted out of it.

"Disposed of" will include any transfer whether by sale, gift or disposition in favour of trustees. By (3) (*c*) of section 39 it includes any disposition of the whole of the relevant interest vested in the estate owner with one exception. That exception exempts any disposition *other than a sale* made by an estate owner acting in a fiduciary capacity.

Example.—L. holds a lease of Blackacre for ninety-nine years from 1910. On May 1, 1950, he grants a sub-lease to T. for twenty-five years. Liability to redemption arises at 1.5.50.

(c) Where the " relevant interest " comes to an end.

This will presumably cover only the cases where a lease, which on April 1, 1950 had fifty years unexpired, reaches its term or is surrendered.

(d) Where the sole beneficial owner in possession of the relevant interest dies.

The definition of relevant interest will make the section applicable on the death of a long leaseholder as well as on death of a freeholder.

The " beneficial owner in possession " is by (3) (*a*) of the section the person who is for the time being beneficially entitled to possession of the property or any interest arising therefrom. He may be so entitled either as holding the " relevant interest " or by virtue of a trust. Any assignment of a life interest, however, under a settlement or a trust is to be disregarded so long as the life interest subsists. It follows that, where a life interest in a property exists, the death to be considered is that of the life tenant even though he may have settled his interest on a third party who would, apart from the exception, be treated as a " beneficial owner in possession ".

Any annuity, charge, or incumbrance upon the property is to be ignored in deciding who is beneficially entitled to possession or to the income.

There is an overriding exemption conferred by section 38 where the principal value of the estate of which the relevant interest forms part is less than £2,000. In such circumstances Reg. 15 provides for the issue of a certificate of exoneration to the person who would otherwise have been liable to redeem.

Where the " relevant interest " would have been exempt from estate duty it is nevertheless to be aggregated in determining whether the principal value of the estate is less than £2,000. Thus for example :—

> Two years before his death, A, who is the owner of Blackacre and Whiteacre, conveys Blackacre to trustees for a marriage settlement on the wedding of his son. On A's death, Blackacre will be exempt from estate duty by virtue of section 59 (2) Finance (1909–10) Act, 1910. Its value will nevertheless be included in determining whether the principal value of A's estate is less than £2,000 so as to exonerate Whiteacre from Land Tax.

Where the interest of the deceased was that of trustee of a charitable or public purposes trust, or as holder of an office, or as

recipient of the benefits of a charity, or as a corporation sole, the subsection does not apply.

So that where, for example, some person is in receipt of the rents of land under the terms of a charity, his death will not give rise to a liability to redeem. The exemption will similarly apply where the relevant interest is held by a bishop, incumbent, or the master or fellow of a college.

(e) Where the beneficial owner in possession of the relevant interest is a corporate or unincorporated body of persons or the sole trustee of a trust established for charitable or public purposes only.

In such a case liability to redeem is to arise on January 1, 1954.

All companies formed under the Companies Acts will therefore be liable to redeem any Land Tax charged on lands owned by them on January 1, 1954 at the latest.

Redemption date.

Except where liability arises under category (e), the redemption date will be the date on which the event occurs which gives rise to the liability.

If the beneficial owner is a body corporate its liability to redeem may of course arise under (b) or (c), and the date for redemption will then be the date on which the event occurs which gives rise to the liability, and not January 1, 1954.

Persons liable for redemption money.

The redemption money is to be payable by the person who holds the relevant interest immediately after the property becomes liable to redemption. (Section 40 (2).) If liability arises by determination of the relevant interest, the estate owner by virtue of the immediately expectant reversion is liable.

Where land is sold therefore, redemption will be the liability of the purchaser. Where an owner grants after April 1, 1950, a lease for twenty-one years or more, the owner, not the lessee, will be liable. Even though the lease be for a term exceeding fifty years, since it has been granted after April 1, 1950, it will not confer the "relevant interest" on the lessee and the lessor will remain liable for the redemption money.

Where liability arises by reason of the death of the estate owner, it falls upon the deceased's personal representatives by virtue of section 40 (5) which provides that the persons on whom the "relevant interest" devolves as personal representatives, whether or

not appointed by will, shall be deemed to become estate owners of the interest immediately on death.

Redemption money.

By section 40 (1) the amount of the redemption money is fixed at twenty-five times the annual charge. Reference to section 37 shows that this annual charge is to be the amount of the Land Tax attributable to the property for 1948–9 (the " basic year ") except that where for 1948–9 there was a surplus over the parish quota, the annual charges for the parish are to be reduced so that they produce the amount of the quota less the amount redeemed by the 1948–9 surplus.

Section 40 (4) makes the redemption money a charge on the estate as a land charge of Class B under Land Charges Act, 1925, but *not* an Inland Revenue Charge under section 59 of the Land Registration Act, 1925. The Commissioners of Inland Revenue are given power to enforce the charge under the Law of Property Act, 1925, as if they were mortgagees by deed with powers of sale and lease and of appointing a receiver.

By Regulation 11 of SI No. 268 of 1950, it is prescribed that the Registrar of Land Tax is to give to the person liable a notice of the amount of the money due, which is to be due and payable at the expiration of one month from the issue of that notice. Payment of the money is to be made to the Accountant-General of Inland Revenue (Regulation 13). The Registrar is to enter the redemption in the register and issue a certificate of redemption to the person liable for the redemption money (Regulation 14). Such a certificate is to be good and sufficient evidence of redemption for all purposes.

Apportionment.

Section 39 (3) provides that the expression " property " includes any part of a property. It follows that where part of a property charged to Land Tax is sold or leased for more than twenty-one years, the Land Tax on that part becomes liable to redemption. Regulations 5–9 provide the machinery of apportionment.

The Inspector of Taxes is to apportion the annual charge between the property liable to redemption and any other properties comprised in the same assessment and is to serve a notice of the amount of the apportionment on the owner of any property concerned. Within twenty-one days of service of the notice, anyone aggrieved by the amount apportioned to any property may appeal by written notice to the Inspector. The Inspector may then agree

in writing with the appellant that no adjustment need be made, in which case no notice need be given to anyone else. If, however, he considers that an amended apportionment should be made, he may agree in writing with the owner of *each* of the properties affected by the change how much of the charge should be apportioned to that property. Any agreement, either to maintain the original apportionment or to vary it, has effect as if the Land Tax Commissioners had determined the apportionment at the date of the agreement and according to its terms.

If an appellant decides not to proceed with his appeal he may give the Inspector written notice accordingly. The apportionment is then to be deemed to have been determined by the Land Tax Commissioners at the date of the notice, unless within thirty days the Inspector serves a counter-notice reserving the right to vary the apportionment.

Where agreement cannot be reached, the appeal is to be referred by the Inspector to the Land Tax Commissioners for determination by them.

The Commissioners are to notify the date and time of hearing to (1) the Inspector, (2) the appellant, and (3) so far as possible to the owner of any property on which the annual charge would be affected by a variation of the apportionment. Any of these persons has the right to be heard at the appeal, at which two Commissioners form a quorum. The appellant and any other person who has the right to appear may be represented by any agent he may appoint. (This is in line with the provision in Finance Act, 1923, s. 26 (2) regarding representation at an appeal against an Income Tax Schedule A assessment.) The Inspector, or any other person nominated for the purpose by the Commissioners of Inland Revenue, also has the right to be heard.

If the Commissioners think fit they may summon witnesses and examine them on oath. No penalties, however, are provided in case a person summoned fails to attend or declines to give evidence.

Notice of liability to redeem.

Any person who becomes liable for the payment of redemption money is bound by section 40 (7) and Regulation 3 to give notice of the fact to the Registrar of Land Tax. If the liability to redeem arises by reason of the death of the owner and the property is exonerated because the deceased's estate is valued at less than £2,000, notice must still be given. The notice is to be served not

later than three months from the date from which the property becomes liable to redemption, or where the liability arises on a death, within three months from the grant of representation to the estate. (Regulation 3.)

The Registrar has then to give notice to the person liable of the amount of the redemption money (Regulation 11). The money is due and payable at the end of one month from the issue of the notice.

The Land Tax ceases to be payable as from the last quarter day before the date on which the redemption money becomes due.

Example.—A property becomes liable to redemption on June 30, 1950, by reason of the death of the owner of the fee simple. Probate of the will is granted to the executors on December 20, and they give notice to the Registrar of their liability on March 10, 1951. The Registrar gives notice of amount of the redemption money on April 15. The redemption money is then due and payable on May 15, and on Land Tax ceases to be payable as from March 24, 1951.

Crown property.

Crown property is by section 38 (1) exonerated from Land Tax unless it is occupied by some other person. If it is so occupied, it becomes liable to redemption by section 39 (1) (a). Assuming that it is not occupied under a lease having 50 years unexpired on April 1, 1950, the liability to redeem will fall upon the Crown. By section 40 (2) it is provided that in such circumstances the redemption money shall be deemed to be paid on the date on which it becomes due. For practical purposes therefore any property which on April 1, 1950, belongs to and is occupied by His Majesty, the Duchy of Cornwall or a Government department, is permanently freed of Land Tax, while liability for redemption in respect of Crown lands, etc., will only fall on a subject-occupier holding by virtue of a lease having fifty years still to run at April 1, 1950.

Increase of rent, etc.

The Schedule to the Regulations applies ss. 126, 127, 141 and 149 of the Land Tax Redemption Act, 1802, to compulsory redemption with certain modifications. The effect of the modified sections is that where any tenant of lands, etc., is bound by agreement to pay the Land Tax charged upon the lands, and that Land Tax is redeemed, the tenant is to pay for the remainder of his tenancy an additional rent equal to the amount of the Land Tax.

The Land Tax on Crown property or that of the Duchy of Cornwall which is redeemed is also to be regarded as additional rent due from the lessee. Conversely, where the land is charged with a fee farm, feu duty, or other annual rent from which the payer could have deducted a proportion of Land Tax under the Act of 1798, the deduction is to continue although the tax is redeemed.

VESTED INTERESTS REMOTE FOR PERPETUITY

By A. K. R. Kiralfy, Ph.D., LL.M., Barrister-at-Law

This year's issue of *The Cambridge Law Journal* contains an important article by Mr. J. H. C. Morris of Oxford University, on the subject of "Ulterior Limitations and the Rule against Perpetuities" (pp. 392 ff.). The learned writer rejects the test of "dependent" and "independent" limitations and concludes that subsequent vested limitations remain valid but that all subsequent limitations affected by the contingency are themselves void for perpetuity. The great problem remains only partially answered, however, so long as there is no clear test for the third group, limitations which are not specifically subject to the same contingency as the prior void limitation. The learned writer suggests that there is no satisfactory test, and that the Courts are in reality in modern cases introducing a number of exceptions with the object of absorbing the old rule which applied contingencies to subsequent limitations, so as to bring the law into harmony with humanity. It is submitted, with respect, that this may be misleading for the future draftsman, and that the Courts may well continue to make fine distinctions but without abrogating the general rule, which must never be lost from sight. This is confirmed by the recent case of *Re Mill*, [1950] 1 All E. R. 789. Why is this subject so difficult? The answer is that *Gray on Perpetuities*, like most textbooks on Real Property law, never deals directly with the subject of vesting and contingency outside the field of the Rule against Perpetuities. The Courts in perpetuity cases, admittedly, never cite any authorities from outside that field, but it appears that they are developing the law in complete harmony with the general law applicable to contingencies. Take the simple case, to A for life if he marries, on his death to B. A dies unmarried. Does B take? This problem must be solved first before the more complicated problem of perpetuities can be solved. The question of contingency in general precedes the problem of ulterior limitations. Whether the ulterior limitation is contingent can be decided first, and then the problem under the perpetuity rule will solve itself.

The result of a number of cases, old but apparently unquestioned, is that there is a legal presumption that interests following

a contingent interest in a regular unbroken series are subject to the same contingency (*Theobald on Wills* (10th ed.) 394, *Halsbury*, vol. XXXIV 375). The Court referred, in the leading case of *Toldervy* v. *Colt* (1836), 1 M. & W. 250, at p. 283, to " a rule of construction, founded on plain common sense, that where a condition precedes a certain series of limitations, each of that series must be taken to be affected by that condition, unless there is a manifest intention upon the face of the will to be collected to the contrary ". There a gift had been made contingent on a marriage, with a gift over " on default of issue of the marriage ". If no marriage took place the gift over failed. On the other hand the notion of an " independent " limitation over is as old as *Lethieullier* v. *Tracy* (1754), 3 Atk. 774, where Lord Hardwicke, L.C., pointed out that a gift " to X when he attains 21 " was made in a separate clause, after a gift upon a contingency " until X attained 21 ". He held, accordingly, that the gift over was not subject to the contingency which affected the immediately prior gift.

Another way in which to make the ulterior gift unconditional is to introduce it as " subject to " the earlier limitations, so that they may be treated as engrafted on it rather than as preceding it. Thus, in *Pearson* v. *Rutter* (1853), 3 D. M. & G. 398, at p. 406, Lord Cranworth, L.C., says, " He then stops and breaks off, by introducing the words ' subject to the trusts hereinbefore thereof declared ' which I think should be read independently of the former clause ". Lord Cranworth referred to *Lethieullier* v. *Tracy* (*supra*) as a case of " fresh departure and a start upon a new disposition ". A more modern case in which these rules were followed was *Re Blight* (1880), 13 Ch. D. 858, where Fry, J., held " Whether the children of Sarah take the annuity depends upon whether the gift to those children is an independent and substantive gift or is one of a series of gifts, all of which depend upon the contingency of Lucy commencing to receive the annuity ".

The test of dependence is therefore a substantive rule quite apart from the rule against perpetuities. That the rule is applied identically in the different contexts is also clear. Thus the " fresh start " which made the ulterior limitation in *Lethieullier* v. *Tracy* (*supra*) independent may be compared with the " fresh start " which had the same effect in the perpetuity case of *Re Norton*, [1911] 2 Ch. 27 (especially as explained by counsel in *Re Hewett*, [1915] 1 Ch. 810, at 813). And the formula " subject thereto " which made the gift over independent in *Pearson* v. *Rutter* (*supra*) had the same effect in the perpetuity case of *Re Canning*, [1936] Ch. 309. Indeed it is impossible to construe a contingency in one

way to decide whether it applies to a gift generally, and in another way to decide the application of the rule against perpetuities. To do so would be to violate the familiar rule that the rule against perpetuities must not be considered when originally construing a limitation, a rule referred to in recent times by Clauson, J., in *Re Coleman*, [1936] Ch. 528 (at p. 535), and by Lord Greene in *Re Legh*, [1938] Ch. 39 ("the temptation to construe words in such a way as to exclude its application is one which must be firmly resisted").

Mr. Morris follows *Gray on Perpetuities* in criticising the "intention test". It is suggested that what the Judges mean in these cases is the "expressed intention" that one limitation should attend upon another, that their bounty should follow a certain system of preference or priority. The reference to "intention" in no way includes a mere surmise as to what the testator might have intended, but has left unexpressed. Lord St. Leonards' dictum in *Monypenny* v. *Dering* (1852), 2 D. M. & G. 182, meant that the testator had, in fact, postponed the later gift to the earlier and therefore meant Y to take only if X in fact took, so that if X was not permitted to take, Y could not take either. This follows an earlier dictum of Lord Alvanley in *Routledge* v. *Dorril* (1794), 2 Vesey 357, that, where Y was to take on failure of the issue of X, Y could not take if X had issue which were not permitted by law to take. Stirling, J., followed these explanations in a well-known passage in *Re Abbott*, [1893] 1 Ch. 54, at 57, saying that the donee was "not intended to take unless and until the prior limitation is exhausted". Romer, J., in the recent case of *Re Mill's Declaration of Trust*, [1950] 1 All E. R. 789, clearly repeated the reason (at p. 795) "In my judgment the gift over is expectant on the failure of a class which the settlor intended to benefit, but which, had it come into being, would have been precluded by law from taking and is avoided by the principles recognised in the two decisions (*Monypenny* v. *Dering* (*supra*); *Re Thatcher's Trusts* (1859), 26 Beav. 365) to which I have referred". Gray (4th ed., s. 254) confuses this "expressed intention" with some presumed intention as to what a testator might have wished, had he been reminded of the effect of the rule against perpetuities on his will. This is open to two grave objections, that it is contrary to the law of construction of wills, and that it presupposes a rather ridiculous position in which a testator wishes to redraft his will to save an ulterior gift, but does not wish to do so to save the prior void limitations, which are uppermost in his mind. If a testator knew his dispositions were defective he would redraft his entire will and not simply the last

part of it. That a surmise as to what a testator might intend in changed circumstances is inadmissible appears from many cases, *e.g.* " a Court of justice has no right in interpreting a will to make a probable conjecture of what a testator would have done in a particular case and then to do it for him, when there are no words in the will to justify that course " (*Toldervy* v. *Colt* (1836), 1 M. & W. 250, cf. *Quicke* v. *Leach* (1844), 3 M. & W. 218, 228; *Pearson* v. *Rutter* (1853), 3 D. M. & G. 398, 407).

Mr. Morris concludes that, in principle, a vested limitation should never be subject to the perpetuity rule, but that some of the cases seem to suggest that it may. The judgments in these cases are not illuminating and it is not clear on what principle the ultimate limitations were held to be void in several of them. In some of the cases there was a clear imposition or repetition of a condition (*Monypenny* v. *Dering* (1852), 2 D. M. & G. 182, condition that eldest son die without issue, before second son takes; *Re Thatcher's Trusts* (1859), 26 Beav. 365, contingency of no child attaining age of twenty-five; *Re Hewett*, [1915] 1 Ch. 810, contingency the same; *Proctor* v. *Bishop of Bath and Wells* (1794), 2 H. Bl. 358, gift to C if B had no son who became a clergyman). But in the cases of *Re Mortimer*, [1905] 2 Ch. 502 (C. A.), and *Re Backhouse*, [1921] 2 Ch. 51, the ulterior gift was not itself intrinsically contingent but merely followed another gift. In *Re Mortimer* the gift over was introduced by the phrase " after the determination of all the aforesaid uses ", and in *Re Backhouse* by the words " and then ". These words might imply a postponement but were treated as implying the exhaustion of the prior interests after fulfilling the conditions precedent to which they were subject. It is likely that the Court was applying the presumption that a later gift is presumed to be governed by the contingency affecting the prior gift, but this is not stated. Gray's explanation (para. 251) appears highly artificial; he says the gift over is subject to the same condition that the prior gift was to fulfil, but that, as the law would not permit such condition to be performed, this condition became collateral and prevented the gift over being vested. This explanation ignores the testator's own directions and expressed intentions and does not recommend itself to the present reviewer. *Re Backhouse* (*supra*) seems to use the simple remainder form. That it laid down any rule that a vested interest could be void for perpetuity was a proposition rejected by Clauson, J., in *Re Coleman*, [1936] Ch. 528, and it might be simpler to treat this as a doubt on the validity of *Re Backhouse*. If the case is to stand it appears likely that the presumption of repetition of contingencies is the explanation.

Re Coleman (*supra*) dealt with a discretionary trust for a future wife for life, with a gift over to the children of the marriage. Such a gift over had to vest within the perpetuity period and the death of the mother was inevitable and not a contingency. The application of the discretionary trust was a contingency but not one that affected the gift over in any way. The only contingency affecting the children was their own birth, and this was independent of the other contingencies. Limitations which are independent and must vest, if at all, within the period, are treated in the same way as vested interests, for perpetuity purposes.

The tacit assumption of the Court, in cases like *Re Backhouse*, that the later limitation was contingent may have another explanation. It is notable that the cases which have been interpreted as "independent limitations" have not used the common law remainder form, whereas those which have been held "dependent", without any express repetition of the contingency, have used that form. It has been suggested by Professor Potter ((1937), 53 L. Q. R. 15) that the Courts may have been influenced by the traditional dependence of a contingent remainder on the fate of its particular estate. Thus in the days before the Contingent Remainders Act, 1877 (and Real Property Act, 1845) the premature determination or invalidity of the prior particular estate would drag down any contingent remainders with it. If, again, property were left to A for life, remainder to such of his children as attained twenty-five, whether a given child took under this gift depended on the date of his father's death, so that the vesting of the remainder depended very materially on the effectiveness and duration of the prior estate. The rule against perpetuities did not apply to legal contingent remainders until the decision in *Re Ashforth*, [1905] 1 Ch. 535, but the "old rule" against perpetuities did, and many of the cases cited by Mr. Morris turned on invalidity under the old rule. If an interest was immediately vested, then it would never be dependent on the particular estate in the sense described, but in a case like *Re Coleman* the children, being as yet unborn at the time of the will, took contingent interests, and such limitations might in earlier times have been liable to destruction by the invalidity of the parent's interest.

One further brief point might be made. Mr. Morris argues that it should be immaterial how the prior limitations determine (following Mr. R. E. Megarry (1944), 60 L. Q. R. 298). Mr. Megarry cited the example of a case where the prior gift was an excessive appointment or the prior beneficiary never came into existence, in the event, in order to satisfy the condition. But in fact, though the cases are

obscure, it is a rule that if an appointment be made to a stranger's children, with a gift over "in default of such children" to an object of the power, the object's gift fails as well as the first gift, if the stranger has children, as the condition has not been satisfied on which the gift over operates (Farwell, *Powers*, 3rd ed. 350). Where a gift over operates where A never has a son, where the will specified that it should operate if A's son died under twenty-one, the reason is quite distinct. Under the rule known as the rule in *Jones* v. *Westcomb* (*e.g.*, *Re Bowen*, [1949] Ch. 67) the Court implies an alternative condition "or has no son" as the inevitable, and not merely conjectural, intention of the testator. This subject throws no light on the subject of ulterior gifts. The argument that it did so was rejected by Lord Alvanley, in *Toldervy* v. *Colt* (1836), 1 M. & W. 250, in the following terms: "Those cases do not furnish questions (*sic*) upon the operation of a condition upon subsequent limitations, but they are mere cases respecting the construction of the condition itself".

THE RIGHT TO TAKE FLOWING WATER

By Peter Brett, LL.B., Solicitor

I propose, in this short article, to examine the nature and extent of the rights which a landowner may possess or acquire in regard to the abstraction of water flowing past or across his own or another's land. The subject is one which is acquiring an increasing importance at the present time, when new manufacturing enterprises, requiring a constant and secure supply of water, are being begun, and old ones extended.

The first question which has to be considered in deciding whether a person has the right to abstract water from a flowing stream is the nature of the stream itself. Is it a natural or an artificial (man-made) stream? If the former, is it navigable or not? I shall confine the present inquiry to natural streams; for the rights which may exist as regards an artificial stream depend on the circumstances surrounding its creation, and vary accordingly (*a*). No such difficulty arises in regard to natural streams, whether navigable or not; the rights are the same in each case, subject in the case of navigable streams to the qualification that no rights can be possessed or acquired which would interfere with the public right of navigation (*b*).

It will be convenient, at the outset, to dispose of the question, what is a riparian tenement? Although the short answer is that a riparian tenement is one abutting on a stream, or one through which a stream flows, the matter requires further consideration. How far does a riparian tenement extend? If Blackacre, consisting of some 2,000 acres, abuts on a stream at one point for a distance of ten feet, is it wholly a riparian tenement? The *dicta* on this matter are conflicting. In *Ormerod* v. *Todmorden Mill Co.* (*c*), Brett, M.R., said (*d*), "The plaintiffs are the owners of a wall facing the stream and of a strip of land behind it six feet in depth: this abuts on the river, and is sufficient to make the plaintiffs riparian owners". On the other hand, in *McCartney* v. *Londonderry and Lough Swilly Ry.* (*e*), Lord Macnaghten said (*f*), "I have

(*a*) *Rameshur Pershad Narain Singh* v. *Koonj Behari Pattuk* (1878), 4 App. Cas. 121.
(*b*) *North Shore Ry.* v. *Pion* (1889), 14 App. Cas. 612.
(*c*) (1883), 11 Q. B. D. 155.
(*d*) At p. 167.
(*e*) [1904] A. C. 301.
(*f*) At p. 311.

only to add that in my opinion it would be extravagant to suggest that the system of the Londonderry and Lough Swilly Railway Company and the lines of other companies over which they have running powers form one single riparian tenement, or that the railway company, by virtue of contact with this stream at one point, possess throughout their system, and all through the lines of other companies over which they have running powers, rights analogous to those possessed by persons who dwell on the banks of a river in respect of their riverside property. It may be difficult to say how far the rights of the railway company as riparian owners extend, but they can hardly go to such a length as that ".

There does not appear to be any reported case which defines the extent of a riparian tenement, and it would accordingly seem that each case must be decided in the light of its own facts. As Parke, B., said in discussing this question in *Embrey* v. *Owen* (*g*), " It is entirely a question of degree ".

Assuming, therefore, that the land is a riparian tenement, what are the rights of the landowner as regards the abstraction of water from the stream? It is now well settled that he has certain natural rights, that is, rights which are not strictly speaking appurtenant to the land but are part and parcel of the sum total of rights which comprise his ownership (*h*). The extent of these natural rights has been expounded in a number of cases; by Parke, B., in *Embrey* v. *Owen* (*i*), by Lord Kingsdown in *Miner* v. *Gilmour* (*k*); by Lord Cairns, L.C., in *Swindon Waterworks Co.* v. *Wilts and Berks Canal Navigation Co.* (*l*), and by Lord Macnaghten in the *McCartney Case* (*m*). The exposition of Lord Macnaghten is perhaps the most concise, and yet complete, statement (*n*) :—

" There are, as it seems to me, three ways in which a person whose lands are intersected or bounded by a running stream may use the water to which the situation of his property gives him access. He may use it for ordinary or primary purposes, for domestic purposes, and the wants of his cattle. He may use it also for some other purposes—sometimes called extraordinary or secondary purposes—provided those purposes are connected with or incident to his land, and provided that certain conditions are

(*g*) (1851), 6 Exch. 353, at p. 372.
(*h*) *Per* Parker, J., in *Portsmouth Waterworks Co.* v. *London, Brighton and South Coast Ry.* (1909), 26 T. L. R. 173.
(*i*) *Supra.*
(*k*) 12 Moo. P. C. 131, at p. 156.
(*l*) (1875), 7 H. L. 697. In the *McCartney Case* (*supra*), Lord Halsbury said that Lord Cairns' speech had codified the law on the matter.
(*m*) *Supra.*
(*n*) At pp. 306, 307.

complied with. Then he may possibly take advantage of his position to use the water for purposes foreign to or unconnected with his riparian tenement. His rights in the first two cases are not quite the same. In the third case he has no right at all.

. . . In the ordinary or primary use of flowing water a person dwelling on the banks of a stream is under no restriction. In the exercise of his ordinary rights he may exhaust the water altogether. No lower proprietor can complain of that. In the exercise of rights extraordinary but permissible, the limit of which has never been accurately defined and probably is incapable of accurate definition, a riparian owner is under considerable restrictions. The use must be reasonable. The purposes for which the water is taken must be connected with his tenement, and he is bound to restore the water which he takes and uses for those purposes substantially undiminished in volume and unchanged in character" (*o*).

Such, then, are the natural rights of a riparian owner. They may, however, be insufficient for his purposes; for example, he may need, for the purpose of a factory erected on his riparian land, to take and use water without returning it to the stream. Can he obtain the right to do so?

It is submitted that a riparian owner can acquire, as an easement appurtenant to his riparian tenement, the right to take and use water from the stream in excess of his natural rights. This proposition seems clearly established by the *Swindon* and *McCartney Cases* (*p*). In both those cases, riparian owners claimed a right to take and use water in excess of their natural rights; in each case, the natural rights of the riparian owners lower down the stream were held not to be materially affected by the abstraction. Nevertheless, in each case the House of Lords granted an injunction to restrain any further excessive abstraction on the ground that if the upper owners' (at the time) unlawful abstraction were allowed to continue, it would in due time grow (by prescription) into an indefeasible right. In the *McCartney Case* (*q*), Lord Lindley, echoing the words of Lord Cairns, L.C., in the *Swindon Case* (*r*), said :—

"Although the damage suffered, or likely to be suffered, by the millowner is small, yet it is plain that, if the railway company are not entitled to retain and use their pipe as intended, but are nevertheless allowed to do so without interruption for twenty years,

(*o*) There is a suggestion in some of the earlier cases that manufacture had become so prevalent as to make it an ordinary purpose. This has been finally disposed of by Lord Macnaghten's summary.
(*p*) *Supra.*
(*q*) *Supra.*
(*r*) *Supra.*

they will be infringing the millowner's rights all that time, and will, at the end of the twenty years, gain a prescriptive right to continue such use for ever."

Later in the same speech Lord Lindley said that the right (of abstraction) claimed by the railway company could only be gained by grant or prescription, thus echoing the suggestion in earlier cases (*s*) that such a right is known to the law as an easement. It is not, as might at first sight appear, a profit à prendre, for flowing water is not capable of being owned—it is *publici iuris* (*t*). There are a number of cases which establish the existence of analogous easements, *e.g.*, the right to divert a stream (*u*), and the right to pen back a stream on to the land of a riparian owner (*x*). It is submitted that all these easements are species of the same genus—the right to interfere with the natural rights of a riparian owner—just as a right of way is in essence a right to interfere with a landowner's natural right of exclusive possession and use.

Before leaving this matter, three points must be noticed. First, the grant or prescription must be in respect of a thing certain, or capable of being made certain; it follows that no easement to take and use simply such water as might be needed can be acquired. Secondly, the easement is only valid as against those affected by it, *i.e.*, the grantors or those owners whose natural rights have been injured during the prescription period. This point is illustrated by Cresswell, J., in *Sampson* v. *Hoddinott* (*y*) as follows :—

"By usage, they (*i.e.*, riparian owners), may acquire the right to use the water in a manner not justified by their natural rights : but such acquired right has no operation against the natural rights of a landowner higher up the stream, unless the user by which it was acquired affects the use that he himself has made of the stream, or his power to use it, so as to raise the presumption of a grant, and so render the tenement above a servient tenement".

Thirdly, there is some doubt whether an easement would be allowed, the result of which would be to exhaust the stream. Certain remarks of Lord Cairns, L.C., in the *Swindon Case* (*z*), indicate that it would. On the other hand, there is a dictum of Lord Halsbury in *John White* v. *White & Sons* (*a*) to the effect that it would not. It seems that Lord Cairns' remarks are to be preferred,

(*s*) *Sampson* v. *Hoddinott* (1857), 1 C. B. (N.S.) 590; *Nuttall* v. *Bracewell* (1866), L. R. 2 Ex. 1.
(*t*) *Per* Parke, B., in *Embrey* v. *Owen*, *supra*.
(*u*) *Holker* v. *Porritt* (1875), L. R. 10 Ex. 62.
(*x*) *Cooper* v. *Barber* (1810), 3 Taunt. 110.
(*y*) *Supra*, at p. 611.
(*z*) *Supra*.
(*a*) [1906] A. C. 72.

as being more in accordance with the trend of the cases which have already been noticed.

Having thus dealt with the position of the riparian owner, we can now turn to the non-riparian owner. It is clear that he can have no natural rights, for there is no water to the use of which his property gives him access. It is equally clear that, before any question of taking water arises, he must secure the right of access to the water, for example, by means of a pipe or a cut through riparian land. But once the access is secured, there seems to be no reason in principle why a non-riparian owner cannot acquire the right to take and use water as an easement appurtenant to his land. In at least one case, *Beeston* v. *Weate* (*b*), such an easement, acquired by prescription, has been successfully claimed. The leading textbooks are, however, either silent on the position of a non-riparian owner or treat him as the licensee of a riparian owner. I accordingly propose to examine briefly the three cases which may be taken to suggest that a non-riparian owner can never obtain more than the rights of a licensee.

These three cases are *Stockport Waterworks Co.* v. *Potter* (*c*), *Nuttall* v. *Bracewell* (*d*) and *Ormerod* v. *Todmorden Mill Co.* (*e*). It is true that in all these cases expressions are used which might support the proposition that a non-riparian owner is always a licensee. But these remarks were entirely *obiter*. In *Nuttall* v. *Bracewell*, the right claimed was upheld, and the *Stockport Case* was cited and approved, but distinguished. In the *Stockport Case*, it was laid down that a riparian owner cannot divorce his natural rights from the land—a proposition which could hardly be disputed; the alleged easement claimed was rejected, on the ground that there was no real dominant tenement. In *Ormerod* v. *Todmorden Mill Co.*, the deed of grant set up did not purport to confer any rights to take water. These cases, when carefully examined, establish no more than this, that one riparian owner alone cannot confer upon a non-riparian owner rights which will be binding on other riparian owners. Furthermore, the remarks in them that the non-riparian grantee can sue only his riparian grantor (and no one else), must be taken in their context; in each case the complainant was a complete stranger to the alleged grant, and the question whether or not the grant would be binding on the grantor's successors in title was not in dispute.

It is accordingly submitted that a non-riparian owner can

(*b*) (1856), 5 E. & B. 986.
(*c*) (1864), 3 H. & C. 300.
(*d*) *Supra.*
(*e*) *Supra.*

acquire an easement to take and use the water from a stream to which he has acquired a right of access, and that there is no principle or authority which denies the existence of such an easement (*f*).

Of course, the practical difficulties in the way of both the riparian and the non-riparian owner seeking to acquire an easement of abstraction are great. It is difficult to imagine circumstances which would give rise to the implied grant of such an easement. An express grant would have to be made by all the lower riparian owners, and, if the flow of water to the point of abstraction is to be secured, by the upper owners as well. Prescription presents no such difficulties (except as regards obtaining the right to the flow of water), but the riparian owners may assert their rights at any time while the requisite period is running.

To sum up, then, the following propositions appear to represent the present position :—

(1) A riparian owner has, as an incident of his ownership, the right

(a) to take and use all the water he requires for ordinary purposes,

(b) to take and use water for extraordinary purposes, provided that they are connected with the riparian tenement, that the use is reasonable, and that the water is returned to the stream substantially undiminished in volume and unchanged in character.

(2) A riparian owner can acquire as an easement appurtenant to the riparian tenement the right to take and use water for extraordinary purposes free from the conditions mentioned in 1 (b) above, and

(3) A non-riparian owner who has access to a stream can acquire as an easement appurtenant to his land the right to take and use water from the stream for either ordinary or extraordinary purposes.

(*f*) Another, but much earlier, case which supports it is *Earl of Portsmouth* v. *Bunn* (1823), 1 B. & C. 694.

THE EXECUTORY LIMITATION TODAY

By A. K. R. Kiralfy, Ph.D., LL.M., Barrister-at-Law

1. Executory Limitations and Remainders

The Law of Property Act, 1925, converted all future interests in land into equitable interests (section 1 (3)). It also abolished several rules of the old law of future interests which did not apply identically to remainders and executory interests (*infra*). It is therefore sometimes thought that all future interests are of the same general nature today. Even such an authority as Gray (*Perpetuities*, 4th ed., para. 324, p. 356) states that " As no equitable future interest requires a previous estate to support it, there is no such distinction as exists at common law between contingent remainders and executory limitations ". This point of view seems without authority. The Act provides (section 4 (1)) that " Save as otherwise expressly provided by statute, interests in land which under the Statute of Uses or otherwise could before the commencement of this Act have been created as legal interests, shall be capable of being created as equitable interests ". There is a proviso that such interest must have been capable of subsisting in equity, but as equity followed the law there is no reason why executory trusts similar in form to legal executory limitations should not exist. Various other contexts assume this to be the case. Thus a " settlement " exists where land is held in fee simple " subject to an executory limitation over " (S. L. Act, 1925, s. 1 (ii) (b)) and a person entitled to such a fee simple has the powers of a tenant for life under that Act (*ibid.*, s. 20 (1) (ii)). Several provisions specifically apply to executory limitations, such as the section which saves a gift from perpetuity by reading the age of vesting as the age of twenty-one (L. P. Act, 1925, s. 163 (1)) and the *pro tanto* avoidance of gifts over which hinder the exercise of the powers of an estate owner (S. L. Act, 1925, s. 106 (1) (b)).

Is the executory limitation different only in phraseology from other future interests? In principle the differences are fundamental especially in " shifting " limitations. A remainder and a particular estate form a single fee simple, whereas successive fees can be created by executory limitation, and such limitations defeat prior interests prematurely without awaiting their termination. It happens, however, that other sections of the Acts have eliminated

the most important cases in which this distinction appears to be material. The perpetuity rule applies to both types of interests and this is the most important rule in the modern law of future interests. Such differences as remain are due to the particular form of the executory limitation over, rather than to differences in substantive law. On the other hand, a major difference in principle may at any time emerge, and it seems desirable to attempt to clarify the position, to prevent common misunderstandings, such as the belief that a fee can no longer be limited upon a fee, or that all limitations over after a fee simple are necessarily void for perpetuity because of the indefinite duration of the fee simple.

Before 1926 there were equitable contingent remainders and equitable executory trusts. The former complied with the common law rules of limitation of remainders but could not be destroyed because the legal estate was outstanding in trustees or mortgagees, whereas the latter deliberately violated common law rules, operated by analogy to the Statute of Uses and were equally indestructible (cf. Fearne, *Contingent Remainders* (1844) I, 304; II, para. 117; Jarman, *Wills* (6th ed.) 1432).

Since equitable contingent remainders did not fail through abeyance of seisin it is peculiar that they were not made the model when the law of legal contingent remainders was relaxed. The Contingent Remainders Act, 1877, however, provided that a legal contingent remainder liable to fail might be saved if it might validly have been created as a springing or shifting use or executory devise. As the Act was concerned with conveyancing with the legal estate this analogy may have seemed better than that of equitable remainders, which might just as well have been used.

2. Differences in Substantive Law

The two main applications of the distinction between the substantive law of remainders and executory interests, apart from the problem of destruction, were the controversies over the rule in *Shelley's Case* and the rule in *Whitby* v. *Mitchell*. The latter rule is abolished (L. P. Act, 1925, s. 161). The former rule survives in a sense, owing to the phrasing of L. P. Act, 1925, s. 131. It is still necessary to know the rule in *Shelley's Case* in order to apply this section, although the section then alters the construction which would have been made under the rule (Potter, 8 *Conveyancer*, p. 226). The rule in *Shelley's Case* was applied without difficulty to equitable remainders, following the law (*Van Grutten* v. *Foxwell*, [1897] A. C. 658; *Re Youmans' Will*, [1901] 1 Ch. 720). In these cases trusts had been created but the limitations were to an ancestor followed by a gift to his heirs or heirs of the body. The position

in the case of executory interests was less clear. *Theobald on Wills* (10th ed., p. 310) states that the rule did not apply. *Halsbury's Laws of England* (Vol. 27, p. 738) says it did. The former view appears slightly better supported. Fearne (*ubi supra*, II, para. 401a) stated " Limitations of subsequent interests which are not by way of remainder are not within the rule. The rule arose before such limitations were allowed; and when they were introduced by way of use and devise, the rule was not held to apply to them, either directly or by analogy, because they were not within the reason of the rule ". The point was raised, but not settled, in two cases, *White* v. *Hindle* (1877), 7 Ch. D. 201, and *Richardson* v. *Harrison* (1886), 16 Q. B. D. 85 (C. A.) where Cotton, L.J., held that the subsequent limitation in the latter case was not in fact executory, so that the question did not arise, but referred to the argument that the rule could not apply to executory interests. It is difficult to conceive of a shifting use attracting the application of the rule, as the heirs would not be ascertained during the ancestor's life estate. The position as to springing uses is less clear, as the grantor might be held to have had an intermediate estate. The rule in *Whitby* v. *Mitchell* was rather unexpectedly applied to equitable contingent remainders in *Re Nash*, [1910] 1 Ch. 1 (C. A.). There is no authority that it applied to executory interests and Fletcher, writing in 1913, assumed that it did not (" Contingent and Executory Interests in Land ", p. 87). On the other hand the same might well have been said of equitable contingent remainders a few years before.

3. Special Statutory Provisions

The commonest type of executory limitation is a limitation over on the death of a life in being without leaving issue. Even if it divests a fee simple it is good for the purposes of the perpetuity rule (*Re Pratt*, [1943] Ch. 356) and the commonest executory limitations do operate in defeasance of a fee simple (Jarman, *ubi supra*, p. 1434).

The Law of Property Act, 1925, s. 134, deals with the case of gifts over on failure of issue and constitutes the chief example of the legal importance of this form of limitation. The books do not make its operation very clear and even where its effect is aptly stated authorities are not always cited. The section provides that

> " Where there is a person entitled to an equitable interest in land for an estate in fee simple or for any less interest not being an entailed interest with an executory limitation over on default or failure of any of his issue, whether within or at any specified period or time or not, that executory limitation shall

be or become void and incapable of taking effect if and as soon as there is living any issue who has attained the age of twenty-one years of the class on default or failure whereof the limitation over was to take effect."

The section must be read in conjunction with the Wills Act, 1837, s. 29, which commonly applies to executory limitations though it is not limited to them in terms, and enacts that

"Words which may import either a want or failure of issue of any person in his lifetime, or at the time of his death, or an indefinite failure of his issue shall be construed to mean a want or failure of his issue in the lifetime or at the time of the death of such person and not an indefinite failure of his issue."

There are two exceptions to this general principle; the first is the clause

"unless a contrary intention shall appear by the will, by reason of such person having a prior estate tail or of a preceding gift being, without any implication arising from such words, a limitation of an estate tail to such person or issue or otherwise."

The other is the proviso

"Provided that this Act shall not extend to cases where such words as aforesaid import if no issue described in a preceding gift shall be born, or if there shall no issue who shall live to attain the age or otherwise answer the description required for obtaining a vested estate by a preceding gift to such issue."

This proviso appears designed to deal with the case where the subsequent gift over merely means "and in default thereof" and does not introduce a new contingency.

Both of the above sections apply to wills. The wording of the Law of Property Act, s. 134, does not make this clear, and the definition of "instrument" (section 205) is not helpful. But it has been held several times that the corresponding section of the Conveyancing Act, 1882, s. 10, did apply to wills (*Re Booth*, [1900] 1 Ch. 769; *Re Shrubb*, [1910] W. N. 143) and this is no doubt the law today.

The two sections apply differently for perpetuity purposes. The effect of the Wills Act, s. 29, is to prevent the rule applying. On the other hand the rule against perpetuities must first be applied before L. P. Act, s. 134 can apply. This is pointed out in *Norton on Deeds* (2nd ed., p. 428). Although the section talks of failure after "a specified period" it no doubt assumes the gift is in itself valid, and the provision that the gift shall "be or become void"

in the specified event would be meaningless if it were already void for perpetuity.

The two sections often apply in differing circumstances. Thus a reference to a definite failure of issue at some particular time other than the death of the ancestor will not fall within Wills Act, s. 29 but will fall within L. P. Act, s. 134. Needless to say, the Wills Act does not apply to conveyancing *inter vivos*. The use of executory limitations is probably much commoner in wills since modern conveyancing precedents do not often provide for executory limitations.

Where a limitation falls under both sections their effect is cumulative and not alternative, and the gift over becomes doubly liable to destruction. Thus, assume a devise of land " to A in fee simple, but on failure of the issue of A, to B in fee simple ". Section 29 is first applied and the limitation is construed to read " To A in fee simple but on failure of A's issue on A's death, to B in fee simple ". Section 134 is then applied so that B's interest become defeasible in either event. *Re Booth*, [1900] 1 Ch. 769 gives the form of order appropriate in such cases, the learned Judge holding " Plaintiff is now absolutely entitled subject to an executory gift over in favour of the defendants in the event of her not having any child who should survive her or attain twenty-one in her lifetime ".

It need hardly be pointed out that, as in the case of the provisions of the Wills Act, s. 33 as to lapse, the issue themselves take no direct benefit. The birth and majority of issue make the grantee's estate absolute and it may be freely disposed of by him. The analogy of disentailment, on which section 134 is based, is therefore incomplete. Both father and son join in the disentailment and resettlement whereas the father alone acquires an absolute interest under section 134.

4. Effect of Exception of Entailed Interests by the Statutes

It may be remembered that both Wills Act, s. 29 and L. P. Act, s. 134, expressly except entailed interests from their operation. The reasons were not the same in both cases. Section 29 was designed to save gifts from the perpetuity rule, and a gift which must take effect not later than the termination of an entail is exempt from the operation of the rule. Section 134 excepts entails because the existing possibility of barring the entail made special provision superfluous, and section 134 is designed to imitate to some extent the power to bar entails. It is not, therefore, surprising that the expressions used in the two Acts to except entails are not identical. Section 134 excepts all entails, whereas section 29 excepts those

which arise independently of any implication arising from the reference to failure of issue. The result is paradoxical, as will now be seen.

There is an old common law rule, usually referred to as the rule in *Morgan* v. *Morgan* (1870), L. R. 10 Eq. 99, under which a gift to X and his heirs, with a gift over on failure of issue, creates an entail. The reason seems to be this, that " heirs " is wide enough to mean " general " or " special " heirs, and the references to failure of issue confirm that the second meaning was intended. Here the creation of the entail depended on the reference to failure of issue. Hence, so far as wills are concerned, Wills Act, s. 29, appears to have abrogated it. This does not appear to be the case in a deed, so that a third form of limitation of an entail exists, under the Law of Property Act, 1925, besides the words " heirs of the body " and " in tail ". The Law of Property Act, s. 130 (1) permits an entail to be created by " the like expressions as those by which before the commencement of this Act a similar estate tail could have been created by deed in freehold land ". This would cover *Morgan* v. *Morgan* (*supra*). Section 134, as we have seen, excepts all entails, and also leaves this case unaffected. " And his heirs " may be used to create a fee simple (L. P. Act, s. 60, proviso) but need not necessarily have that effect. Two cautions might be apposite. If the more common form, " to X in fee simple " is used it is doubtful whether *Morgan* v. *Morgan* could have any application, as the intention to create a fee simple and not an entail would be clear. Again, in practice, more complicated references to failures of issue require a careful study of numerous decided cases on construction.

5. Vested and Contingent Executory Limitations

We have now to consider another interesting point, the vesting in interest of an executory limitation. Executory interests were never scientifically divided into " vested " and " contingent " interests, as were remainders. Some forms, *e.g.*, to A one year after the death of B, appear to be vested, though the commoner forms, on failure of issue, are clearly contingent in nature. It is peculiar that the expression " vested " was not applied to any executory interest. The effect of the Statute of Uses, 1535, in the first example was to " vest " the legal estate in the grantor during the year from B's death, so that it was impossible to hold that it was also vested in the grantee. Another difficulty was that formulation of " vesting " which insisted that the grantee be ready to take should the prior interest at any time lapse. A, in the above example, was not ready to take as soon as B died. On the other

hand, for all practical purposes, A had a vested interest. The same tests should today be applied to all types of future interest. Professor W. F. Walsh, in America, holds that " Executory future interests may be and are vested or contingent exactly as are remainders, and dependent on the same principles " (*Commentaries on the Law of Real Property*, Vol. 3, p. 206). Since the perpetuity rule has no application to vested interests this is an important point. Gray's view, that executory interests need not be so divided, seems hazardous (*Perpetuities*, 4th ed., p. 107).

6. Liability for Waste

Although limited owners today have the fee simple in land vested in them the courts tend to base their liability for waste on the incidents of their beneficial equitable interests (*Re Harker*, [1938] Ch. 323; *Re Fitzwalter*, [1943] Ch. 285). It is therefore important to remember that the tenant in fee simple subject to an executory limitation over is not liable for waste. The statutes which created liability for waste in the Middle Ages referred specifically to tenants for life or years. This is the original reason for the dispunishability of the tenant in tail, though the power to bar may be its rationalisation. *A fortiori*, if property is given in fee simple, the grantee cannot be liable for waste. The rule was laid down by Lord Campbell, L.C., in *Turner* v. *Wright* (1860), 2 De G. F. & J. 234, pointing out, " The onus seems to lie upon the plaintiff to show, by authority, that a tenant in fee simple, subject to an executory devise over, is not entitled to cut timber. It is admitted that no express decision to this effect is to be found in the books, and that no instance has ever yet occurred of an adult devisee in fee with an executory devise over being restrained ". The Lord Chancellor held that the devisee was liable for equitable waste. This is reasonable enough, but he seems to have gone too far when he cited the analogy of tenant in tail after possibility of issue extinct. That does not apply to a tenant in tail general, and it is hard to assume that a man will not or cannot have issue so long as he is alive. *Turner* v. *Wright* (*supra*) was followed in *Re Hanbury's Settled Estate*, [1913] 2 Ch. 357, where Eve, J., stated " If this were the simple case of a tenant in fee with an executory limitation over, I should be prepared, following Lord Campbell, to hold that such a tenant is unimpeachable for waste ". He held that capitalisation under S. L. Act, 1925, s. 47 (then S. L. Act, 1882, s. 11) might possibly be ordered in the case of mining leases in such circumstances.

7. Executory Limitations in Income

Prior to 1926 a peculiar form of executory limitation was the result of certain rules as to the payment of the income of contingent devises to a class of devisees, *e.g.*, " to such sons as attain the age of twenty-one ". At common law those members ready to take a remainder when the prior estate determined alone had any claim (*Symes* v. *Symes*, [1896] 1 Ch. 272). In equity, on the other hand, all could take, and this is now the rule in all class gifts. On the other hand, even in equity, income was divided among those whose interests had vested, to the exclusion of those still under age or otherwise contingently entitled (*Re Averill*, [1898] 1 Ch. 523; *Re Stevens*, [1915] 1 Ch. 429). These cases always arose under wills and the rule was thought harsher than the rule which applied to bequests of personal property and mixed gifts of real and personal property by will, in which the income was tentatively divided into as many shares as there were potential beneficiaries in existence (*Re Holford*, [1894] 3 Ch. 30, 35, 51; *Re Jeffery*, [1895] 2 Ch. 577; *Theobald on Wills* (10th ed., p. 132)).

In the latter cases it was possible to maintain infant beneficiaries even if they later died while still under age. In the case of division of land the first devisee took the whole income and was only liable to suffer a reduction of income if and as a second member of the class satisfied the contingency. The result was that the first devisee had an interest equivalent to a life interest or fee simple in severalty, subject to a gift over of part of this interest when the second member qualified. He was consequently entitled to the powers of tenant for life under the Settled Land Act, 1882, s. 58 (1) (ii) (*Re Walmsley*, [1911] W. N. 139). So far as settlements *inter vivos* are concerned it seems that this rule will still apply. A strict settlement will normally use successive rather than concurrent interests. A trust for sale will follow the law of personal property. But a settlement under the Settled Land Act might include a contingent class gift in remainder. If so it appears that the first member to qualify will be the estate owner when the prior estate drops, as entitled in fee simple or for life, subject to an executory limitation over (S. L. Act, 1925, ss. 20 (1) (ii), 20 (1) (vi)). If a second member qualifies the land seems to remain settled, as there are still contingencies to satisfy (S. L. Act, s. 1 (1) (iii)), but there will be no one entitled beneficially to more than a share of income and the trustees will be statutory owners (S. L. Act, s. 23; *Re Bird*, [1927] 1 Ch. 210). As soon as all contingencies are resolved there is no hindrance to the statutory trust for sale applying (S. L. Act, s. 36). Class gifts more usually arise under wills and here the

law has been altered by L. P. Act, 1925, s. 175. The rules as to contingent gifts of realty have been equated with those of personalty and intermediate income will be carried. The result seems to be to reverse *Re Averill* (*supra*) and apply *Re Holford* (*supra*) to devises of land unless the will exhibits a contrary intention, though the books have so far hesitated to state this conclusion specifically.

The principle of *Re Holford* (*supra*) certainly seems to apply and the section should be read as attaching its share of income to each share of corpus contingently devised and not simply to the material property the subject of the devise. Assuming that the stricter rule in *Re Averill* (*supra*) still applies to settlements otherwise than by will, it would be advisable for the settlor to insert an express clause attaching a share of income to each contingent devise. A form may be found in *Re King*, [1928] Ch. 330. In that case real and personal property were settled *inter vivos* and the learned judge assumed that the clause as to income merely expressed what the law would imply, but it is no authority that it is superfluous in a settlement of land alone. The clause provides that each year the trustees divide the income into as many shares as there are members in existence and presumptively entitled. This makes it possible to use the income to maintain minor children and accumulate the rest. In view of the provisions of the Trustee Act, 1925, s. 31 (1) (ii), in such a case, the beneficiary is also entitled to the whole income of his presumptive share as soon as he attains his majority, even if the contingency is not satisfied. Thus the possibility of an executory limitation in income can be excluded.

8. Merger

Where a prior fee simple and an executory limitation over in fee simple both come into the same hands no merger occurs. The difference in nature between an " estate " and a " possibility " has been held to preclude it. Lord Ellenborough held that the latter created a new fee, in no sense a reversion on the earlier interest (*Goodtitle d. Vincent* v. *White* (1812), 15 East 174). The problem was material under the old law of inheritance but seems unlikely to arise today.

9. Defeasance of Executory Limitations

If the event occurs on which the defeasance is to operate the prior gift will be destroyed even if, for some reason (*e.g.*, ademption), the gift over does not take effect. The courts have refused to imply that the gift over must become operative in order to defeat the prior interest. This is known as the rule in *Doe d. Blomfield* v. *Eyre*

(1848), 5 C. B. 713. The Exchequer Chamber pointed out that "the estate of A is in such case defeated, not by the giving over of the estate, but by the happening of the event on which the testator intended it should go over". The effect is that the property passes as undisposed of (Jarman, *ubi supra*, 1442). This rule has been held not to apply where the gift over is void for perpetuity. It is rather artificially stated that the law will not permit us to wait for the remote event. The first fee simple therefore becomes absolute. This was recently confirmed in *Re Pratt*, [1943] Ch. 356. There was only textbook authority in point, except that Malins, V.-C., in *Re Brown & Sibly* (1876), 3 Ch. D. 156, had assumed that a prior gift in fee simple could not be prejudiced by a remote gift over, but without argument.

The final problem which arises in the case of executory limitations is this: will they take effect if the prior gift fails prematurely. In the ordinary case of a vested remainder lapse of the particular estate accelerates the remainder (*Jull* v. *Jacobs* (1876), 3 Ch. D. 703). Lord Simonds (then Simonds, J.) recently stated the rule in *Re Hodge*, [1943] Ch. 300 at p. 302: "The reason for postponement disappears". On the other hand, if the subsequent gift is contingent, there is a further reason for postponement. If the contingency has not been satisfied there will be no acceleration of an executory gift over (cf. *Re Townsend* (1886), 34 Ch. D. 357). On the contrary the executory limitation over may be destroyed prematurely if the prior gift is bad. Thus in *Lomas* v. *Wright* (1833), 2 My. & K. 769, a gift was made to X in fee simple with a gift over if X died under twenty-one. The first gift was void on grounds of public policy. The gift over was held to fail with it. In *Brookman* v. *Smith* (1872), L. R. 7 Ex. 271, property was left to X, with a gift over to Y if X died under twenty-one. X died over twenty-one but before the testator. Y's gift failed as the condition had not been strictly performed.

Where, however, the testator in expressing one contingency assumed a broader contingency the court will supply the defect (rule in *Jones* v. *Westcomb*, 1 Eq. Ca. Abr. 245; Theobald, *ubi supra*, 456). It may be clear that the testator wanted the gift over to operate provided the previous gift was out of the way, whatever the circumstances. Thus the death of a child under twenty-one implies the birth of the child, and the gift over will operate if no child is born as well as on the child's dying under age. A less usual case was *Hall* v. *Warren* (1861), 9 H. L. C. 420. The gift over was to operate if a hospital committee was not set up within a fixed time. In fact the gift to the hospital was illegal so that no such committee could validly be constituted. The gift over was held to

be effective. Lord Campbell, L.C., put it (at p. 428) " I apprehend that the failure of the foundation of the hospital was the contingency on which he intended his godson to take, whatever might be the cause of that failure ".

OBLITERATIONS IN A WILL

By Spencer G. Maurice

Section 21 of the Wills Act, 1837, provides, "That no obliteration, interlineation, or other alteration made in any will after the execution thereof shall be valid or have any effect, except so far as the words or effect of the will before such alteration shall not be apparent, unless such alteration shall be executed" as prescribed by the Act. A survey of the cases reveals that the consequences of failing to secure the due execution of an obliteration vary according to the circumstances and the manner in which the obliteration was made.

In *Brooke* v. *Kent* (1840), 3 Moo. P. C. C. 334, the Judicial Committee of the Privy Council gave it as their opinion that intention must accompany the acts mentioned in section 21 of the Wills Act, in the same way as it must accompany the acts mentioned in section 20, which deals with revocation by burning or tearing. Accordingly they held that to render an obliteration a revocation of a will there must be an intention on the part of the testator to revoke, which, if not manifest from the due execution of the obliteration, could only be ascertained by the rules of evidence applied in similar cases under the Statute of Frauds. They decreed probate of a will in its original form when it was apparent, from an unexecuted memorandum which the testator had made at the end of the will, that in altering certain bequests he had intended, not to revoke them, but only to substitute others for them, so that, in the event of the alterations not being valid, the original bequests should stand.

The testatrix in *Townley* v. *Watson* (1844), 3 Curt. 761, completely obliterated certain legacies with a pen and ink so as to make them illegible and did not substitute others in their place. Sir H. Jenner Fust decided that "apparent" in section 21 of the Wills Act must mean apparent on the face of the will itself, and he accordingly refused to admit as evidence of the words which had been obliterated the original draft from which the will had been engrossed. He distinguished *Brooke* v. *Kent*, where evidence outside the will was admitted, because that case turned entirely on the want of *intention* to revoke.

In *In b. Horsford* (1874), L. R. 3 P. & D. 211, Sir J. Hannen was called upon to consider the effect of obliterations consisting

of strips of paper pasted over certain words in a will and codicil; on some of the strips words had been written by which the testator sought to make bequests to several legatees. In the case of the will the strips of paper covered whole legacies, but in the case of the codicil only the amount of the legacy had been obliterated. The learned Judge first considered the will. Having referred to the judgment of Sir H. Jenner Fust in *Townley* v. *Watson*, he said that he did not think that it would be proper to adopt chemical means to reveal the words obliterated. He agreed with Sir H. Jenner Fust's interpretation of the word " apparent " in section 21 of the Wills Act, and he was of the opinion that, if a testator had had recourse to extraordinary means to obliterate what he had written, then the Court was not bound to take any steps to undo what he had done. The Act did not draw any distinction between different modes of obliteration, and he could see no reason why the Court should remove strips of paper used as a means of obliteration rather than ink used for the same purpose. With regard to the codicil, however, His Lordship took a different view, since, although the amount of the legacy had been obliterated, the name of the legatee had been left untouched. He was therefore in a position to infer that the testator's intention was only to revoke that portion of the codicil which was covered in the event of his having effectually substituted another bequest in its place: the doctrine of dependent relative revocation became applicable, as it did in *Brooke* v. *Kent*. Evidence was accordingly admissible to show what the original legacy was, and the strips of paper were allowed to be removed.

The testatrix in *Re Zimmer* (1924), 40 T. L. R. 502, completely erased the word " three " in her will and substituted " two " in its place. In the circumstances of the case it was clear that it was not the intention of the testatrix that the word " three " should be effective, even if the alteration were invalid. Hill, J., finding it impossible to say that the testatrix had made the erasure only upon the condition that the word substituted was effectual, so as to bring in the doctrine of dependent relative revocation, accordingly pronounced for the will omitting the word erased.

A novel point arose in *Re Itter (deceased)*, *Dedman and Others* v. *Godfrey and Another*, [1948] 2 All E. R. 1052. This was an adjourned summons to determine whether an order should be made permitting the use of infra-red photography to ascertain certain passages in a codicil which were concealed by having pasted over them slips of paper with writing on them. Ormerod, J., made the order requested, and the codicil was the subject of a probate action a year later, *Re Itter (deceased)*, *Dedman and Others* v. *Godfrey and Another*, [1950] 1 All E. R. 68, again before Ormerod, J.

Applying *Townley* v. *Watson* (*supra*), his Lordship held that words which could only be read by the creation of a new document, namely, a photograph of the original writing on the codicil, could not be said to be "apparent" within the meaning of section 21 of the Wills Act; they might be discoverable, but that was not the word which was used in the section. His Lordship was, however, able to infer from the fact that the amounts of the legacies only were obliterated, and not the whole of the bequests, that it was the intention of the testatrix to revoke the part of the bequests covered by the slips only if new bequests were effectually substituted. It followed, therefore, that the slips might, if necessary, be removed from the document.

The following rules seem to be discoverable in the cases considered above:—

1. Where some words in a legacy, as opposed to the whole legacy, have been obliterated and other words have been substituted for them, it may be possible to infer that the testator had no intention of revoking the original words unless the substituted words were effective, in which case the doctrine of dependent relative revocation will apply and evidence outside the will itself will be admissible to show what the original words were. (*Brooke* v. *Kent*; the codicil in *In b. Horsford*; *Re Itter.*)

2. Where there is a complete obliteration of the whole legacy with nothing substituted there will be a revocation of the words obliterated, unless they are "apparent" within the meaning of section 21 of the Wills Act, 1837; that is to say, unless they are "apparent" from the will itself, no outside evidence being permissible. (*Townley* v. *Watson.*)

3. Where a whole legacy has been obliterated, so that the original words are not "apparent" within the meaning of section 21 of the Wills Act, and a new gift has been substituted, the doctrine of dependent relative revocation does not apply, outside evidence will not be permitted, and probate will be granted of the will with the parts obliterated blank. (The will in *In b. Horsford.*)

4. Where words in a legacy are obliterated and other words are substituted, and it is impossible to infer that the testator only intended to revoke the original words if the words substituted were effective, the doctrine of dependent relative revocation does not apply, and probate will be granted of the will with the parts obliterated blank. (*Re Zimmer.*)

NOTES OF RECENT CASES

1. *LAW OF PROPERTY AND CONVEYANCING*

Agent's commission.—There have been several cases on agent's commission where the contract was not completed. These cases turn upon the construction of the individual contract, but " when a house-owner goes to a house agent and asks him to ' find a purchaser ', that means that the agent is to find a person who will actually complete the purchase of the house, it being understood that the agent's commission is to be paid out of the purchase price. That is the common understanding of men in these matters If the sale is not completed, the agent gets no commission unless he has procured an actual binding and enforceable contract for purchase. Once the purchaser and vendor have signed and exchanged a contract, the agent has earned his commission because, if the purchaser does not complete, the vendor can recover the amount of the commission from the purchaser by way of damages " : *per* Denning, L.J., in *McCallum* v. *Hicks*, [1950] 1 All E. R. 864 at p. 865 (but see below). " Where the bargain was that the plaintiff should find a purchaser, he must, to earn his commission, at least produce a person bound in law to buy. Whether it is also necessary that his principal, the vendor, should be bound in law it is unnecessary in the present case to decide " : *per* Evershed, M.R., in *Fowler* v. *Bratt*, [1950] 1 All E. R. 662 at p. 663. " I do not know that there is any decision of the Court of Appeal which supports the view that commission is payable to the agents if all that they do is to produce a person who is willing to purchase ' subject to contract '. It may be so if the owner has agreed to such a term, or if he has introduced it himself. The question must always be determined by the terms of the contract between the owner and the agents " : *per* Singleton, L.J., in *Graham & Scott* v. *Oxlade*, [1950] 1 All E. R. 856 at p. 862 (which case appears to override *Giddys* v. *Horsfall*, [1947] 1 All E. R. 460).

" Some confusion has arisen because of the undoubted fact that, once there is a binding contract for sale, the vendor cannot withdraw from it except at the risk of having to pay the agent his commission. This has led some people to suppose that commission is payable as soon as a contract is signed, and I said so myself in

McCallum v. *Hicks* (*supra*). This, however, is not correct. The reason why the vendor is liable in such a case is because, once he repudiates the contract, the purchaser is no longer bound to do any more towards completion, and the vendor cannot rely on the non-completion in order to avoid payment of commission, because it is due to his own fault : see *Roberts* v. *Bury Improvement Commrs.*, (L. R. 5 C. P. 310 at p. 326), and *Luxor* (*Eastbourne*), *Ltd.* v. *Cooper* ([1941] A. C. 108), *per* Lord Russell of Killowen ([1941] 1 All E. R. at p. 45), and *per* Lord Wright (*ibid.*, at pp. 55, 56). If, however, the vendor could show that the purchaser would not, in any event, have been able or willing to complete, he would not be liable for commission : see *British & Beningtons* v. *North Western Cachar Tea Co.* ([1923] A. C. 48, *per* Lord Sumner at p. 72). Where it is not the vendor, but the purchaser, who withdraws, the case is entirely different, for, even though a binding contract has been made, nevertheless, if the purchaser is unable or unwilling to complete, the agent is not entitled to his commission : see *James* v. *Smith* ([1931] 2 K. B. 317 n., *per* Atkin, L.J., at p. 322), and *Martin* v. *Perry & Daw* ([1931] 2 K. B. 310). The vendor is not bound to bring an action for specific performance or for damages simply to enable the agent to get commission. If, however, the vendor does get his money, he would probably be liable to pay the commission out of it " : *per* Denning, L.J., in *Dennis Reed* v. *Goody*, [1950] 1 All E. R. 917 at p. 923.

In *Graham & Scott* v. *Oxlade* (*supra*), the expression was " a person able and willing to purchase ", and it was the vendor who " cried off " before there was any completed contract, but the Court of Appeal held that no commission was payable. In *McCallum* v. *Hicks* (*supra*), the county court Judge held that the contract with the agent meant a " person ready, willing and able to buy ", and that the agent was entitled where a purchaser had agreed to buy " subject to contract ", and the vendor had subsequently refused to go on with the contract, but the Court of Appeal held that no commission was payable. In *Fowler* v. *Bratt* (*supra*), the contract was found to be one " to find a purchaser ", but in this case the Court held that there was a binding contract to purchase and, therefore, the agent was entitled to commission although the vendor failed to complete.

In *Dennis Reed* v. *Goody* (*supra*) (distinguishing *E. P. Nelson & Co.* v. *Rolfe*, [1949] 2 All E. R. 584) the Court of Appeal held that a vendor, who withdraws from an offer notwithstanding that the purchaser is able and willing to purchase, is not liable for commission, but there were complications owing to the introduction of terms in the draft contract. Apart from the analysis of the law

by Denning, L.J., already quoted, that learned Lord Justice also remarked (at p. 924): "I know that agents often say that they have earned their commission when they have done their part. That, however, is a fallacy. An agent does not earn commission as a labourer earns wages. Even though he has done his part, he does not become entitled to his commission until the purchase is completed". It must, however, be borne in mind that this kind of observation is made with a background of customary expressions such as "introducing a purchaser able and willing to purchase", and such like. The agents are increasingly unwilling to take the "business risk", as Denning, L.J., described it, of the contract going off and their labour proving fruitless. In any given case it is necessary to analyse both the particular contract and the cases, most of which are discussed in the cases collected in this note.

Perpetuity—vested interest too remote—"issue"—indefinite gift of income.—Although, generally speaking, the perpetuity rule will not be applied to any but contingent interests, there is an exception of some uncertainty (see *ante*, p. 148) where a vested interest is dependent upon a prior contingent interest itself void for remoteness. In *Re Mill's Declaration of Trust*, [1950] 1 All E. R. 789, a settlor, having given life interests to his wife and daughter, proceeded to give life interests to all of the daughter's children who should attain twenty-one, and subject thereto to give interests to the issue of such children, and in default of the daughter having issue upon the trusts therein declared. The gift to the issue of the daughter's children was clearly void for perpetuity, since the children were not lives in being for the purposes of the rule.

Romer, J., held that the gift in default of issue was dependent upon the failure of a class who could not take, because the gift was void for perpetuity, and hence the gift in default of issue, though itself a vested interest, was void. This subject is itself very obscure, and is the subject of a more general note in this issue referred to above.

The case contained two other points, both of construction: first, the learned Judge held that on the particular clauses the term "issue" excluded the children of the daughter and included only remoter issue; and secondly, that an indefinite gift of income to the wife and daughter was not more than a life interest, though in other cases it is possible to construe such a gift as a gift of the corpus.

Hire-purchase agreement—right to retake possession.—In *North Central Wagon and Finance Co., Ltd.* v. *Graham*, [1950] 1 All E. R. 780, an auctioneer sold a car and was then sued in conversion on the ground that the seller held under a hire-purchase agreement by the terms of which the owners of the car might determine the hire-purchase agreement if the car was sold. Lewis, J., held that the action did not lie on the ground that until notice was given determining the agreement the immediate right to possession remained in the seller (the lesee under the hire-purchase agreement), and not in the owners of the car. The Court of Appeal, however, held that an action for conversion would lie. Asquith, L.J., pointed out that the general law was that where a bailee did something repugnant to the contract of bailment the right to possession revested in the bailor, and this aspect of the case was stressed by Cohen, L.J. But, as Asquith, L.J., pointed out, the question turned upon the actual contract, and it was agreed by all the learned Lords Justices that the fact that the contract could be determined without notice (a matter of construction) meant that a *right* to take immediate possession arose immediately the condition was broken. Hence action lay. The case illustrates strongly the fact that conversion depends on a right to immediate possession and not upon possession.

Town and Country Planning—" *development* ".—Section 118 of the Town and Country Planning Act, 1947, authorises the Minister to exercise his powers notwithstanding any Act in force " authorising or regulating any development of the land ". Under a private Act of 1886 certain highways were " preserved in their present condition " : *Harlow* v. *Minister of Transport*, [1950] 1 All E. R. 898. Birkett, J., held that the Minister had no power to make an order stopping up a highway under the 1947 Act because the private Act did not " authorise a development ". Development for the purposes of the 1947 Act is defined by section 12, and requires either works to be done or a material change of use to occur. In this case the purpose of the 1886 Act was to preserve the *status quo* and so was outside the provisions of section 118 of the 1947 Act.

Town and Country Planning — contract relating to use.—In *London Investment, etc., Co.* v. *Ember Estates*, [1950] J. P. L. 421, a contract was signed for the sale of premises, and it was provided that the premises were sold as for use

as " office and business premises ". It was also provided that a declaration of use should be included in the conveyance, and the covenants for title made to cover the declaration of use. Before conveyance it was discovered that only a small fraction of the premises were used as office premises and that the rest had an existing use as a warehouse, and that, in consequence, it was estimated that the premises were less valuable by about £10,000. Vaisey, J., held that the purchasers were not entitled to rescind the contract, because the description " business premises " was wide enough to cover a warehouse, and there was nothing to require any particular area to constitute office premises. The moral of this case appears to be that where the use is material, it is necessary for it to be very specific or the declaration will be of little value. It must, however, be remembered that under the General Development Order, 1950 (*ante*, Vol. 13, p. 3), certain classes of use are defined. If the use is declared in the contract in words which fall into one of these classes it may be that the Court will construe the meaning of the words by reference to such class.

Settlement—forfeiture—appointment of receiver in lunacy.—The Court of Appeal in *Re Westby's Settlement*, [1950] 1 All E. R. 479, has overruled *Re Custance's Settlement*, [1945] 2 All E. R. 441 (noted *ante*, Vol. 10, p. 55) by holding that the appointment of a Receiver in Lunacy does not amount to " any act or event whereby the income of the trust fund would if belonging absolutely to her become vested in or charged in favour of or payable to some other person ". This question has only importance where the order was made before December 16, 1949, because, by virtue of the Law Reform (Miscellaneous Provisions) Act, 1949, section 8 has prevented any such operation from the date of the Act.

Power in favour of any person not being a husband—power exercised as a general power.—In *Re Harvey*, [1950] 1 All E. R. 491, a power was given to daughters respectively, if they had no children, " for such persons or person as she shall by deed or will whether covert or sole appoint ". Two daughters died spinsters, having by their wills appointed a bank trustee and bequeathed the property, including the property subject to the power, to be held upon charitable trusts. Vaisey, J., held that the power was neither general nor

special, referring to his own decision in *Re Jones*, [1945] Ch. 105 (noted *ante*, Vol. 9, p. 223), that the absence of reference to purposes did not prevent the power from being treated as a general power if that was appropriate, *Re Dilke*, [1921] 1 Ch. 34; and that, as neither of the testatrixes had husbands at their death, and could not have husbands, it was within the definition of general power in the Wills Act, 1837, following the principle laid down by Kekewich, J., in *Re Byron's Settlement*, [1891] 3 Ch. 480, and that the power was effectively exercised. This decision does not carry the law much further, but emphasises the peculiarity of this "third class" of power intermediate between general and special powers.

Perhaps the most striking feature of this case is that a power may, *at least for some purposes*, change its character. The questions to which this type of third class of power give rise are of importance today, because of the desirability of combining the utmost flexibility as to capital and income, together with the most adequate restraints to avoid extravagance and unnecessary incidence of taxation. Many more authorities will be needed before the position clearly emerges, and draftsmen must weigh the respective merits of the chances in advising the course to pursue.

Unconscionable bargain with expectant heir.—There was a reflection of the early jurisdiction in Equity in *Levin* v. *Roth*, [1950] 1 All E. R. 698, where application was made to set aside certain bills of exchange given by a mature man without much apparent consideration, which the Judge of first instance set aside on the ground that the owner of the bills had not discharged the onus to show that, as the bills were not to be presented till the death of the testator, from whom the giver of the bills had expectations, the bills were fair, just and reasonable. The bills were given at a time when the relationship of master and servant was not actually in operation, but both before and after there was a service agreement. The bills were renewed from time to time. The Court of Appeal reversed the Judge of first instance on the ground that he had renewed the bills after he had ceased to be an expectant heir. The report is not easy to follow on the facts, but it shows that this jurisdiction is not likely to offer much scope.

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2. *CHARITIES*

Gift to hospital for the purposes of providing accommodation for relatives of sick persons.—In *Re Dean's Will Trusts*, [1950] 1 All E. R. 882, the testator made a bequest to a teaching hospital for the " purpose of providing accommodation for the use of relatives who come from a distance of patients who are critically ill ". Harman, J., said (at p. 883) : " I find no difficulty in saying that the provision of such accommodation may be a very important purpose of a hospital of this kind for the spiritual and psychological comfort of its patients, and, indeed, to aid their recovery ". He then elaborated this point and held that it was a good charitable gift on the ground that " the purposes of the hospital generally are admittedly charitable purposes ". It is a peculiar thing, but we do not recall any decision in which it has been argued that since the National Health Service Act the " general purposes " of a hospital have ceased to be charitable on the ground that these hospitals are maintained under that Act for rich and poor alike, and the meaning of hospitals as it is found in the old Act of Elizabeth no longer applies. It may well be that any such argument would be unattractive.

Gift for non-charitable purpose followed by gift to charity—contingency—void for perpetuity—protection of trustees.—In *Re Wightwick's Will Trusts*, [1950] 1 All E. R. 689, the problem arose where there was a gift of income followed by a gift on such income failing to be applicable to such purpose to a charity. The gift of income was payable to the National Anti-Vivisection Society half-yearly to be applied by certain committees. Wynn-Parry, J., held that this gift failed. An indefinite gift of income is not objectionable, if it does not infringe the rule of inalienability : *Re Chardon*, [1928] Ch. 464. The learned Judge appears to have been prepared to adopt this proposition, but he distinguished this case from *Re Chardon* (*supra*) on the ground that in that case it was a gift of income *simpliciter*, whereas in the instant case the gift was to be applied half-yearly by specified committees and was not, therefore, alienable. This aspect of the decision will require further consideration.

In the second place, the learned Judge held that the gift to the charity was void for perpetuity on the ground that it was a contingent and not a vested gift, and the contingency might occur beyond the rule. The learned Judge formulated a test for ascertaining the contingency of a gift over (at p. 892) : " The test appears

to me to be whether or not the gift over is bound to take effect. If one can find a *dies certus* for the determination of a primary gift then, generally speaking, the gift over will not be construed as being contingent ". So, a gift on the death of a person must take effect, because every person must die. Where the gift over is to residue the gift stands on a special footing, even where the primary gift is of indefinite duration : *Re Randell* (1888), 38 Ch. D. 213; *Re Blunt's Trusts*, [1904] 2 Ch. 767. In this case the primary gift was for indefinite duration and the contingency was not as such bound to happen and, therefore, as the primary gift was not charitable, the gift over was void for perpetuity : *Chamberlayne* v. *Brockett* (1872), L. R. 8 Ch. App. 206.

As a subsidiary point the learned Judge also held that the trustees ought to be relieved of all personal liability under the Trustee Act, 1925, s. 61, for paying the income to the National Anti-Vivisection Society. This they had done in reliance on *Re Foveaux*, [1895] 2 Ch. 501, which was overruled by *National Anti-Vivisection Society* v. *I. R. C.*, [1947] 2 All E. R. 217.

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3. *WILL CASES*

By A. K. R. Kiralfy, Ph.D., LL.M., of Gray's Inn, Barrister-at-Law

Conditional Will—Intestacy.—Re Govier, [1950] W. N. 213. In this case a joint will was drawn up by a husband and wife in 1941 expressed to be effective " in the event of our two deaths ". Both parties would eventually die, but the phrase was construed to mean, if both died as a result of the same enemy action, *e.g.*, in a bombing raid. In the event the husband survived the wife. It was held that the wife's death in 1949 did not satisfy the condition and that the will was inoperative. Her estate therefore passed to the husband on her intestacy and he was granted letters of administration. Willmer, J. followed *In the Goods of Hugo* (1877), 2 P. D. 73.

(Theobald 21.)

Will—Construction—Options to Purchase—Change in Nature of Subject of Option—Optionee Purchaser not Volunteer and Entitled Free from Encumbrances.—Re Fison's Will Trusts, [1950] 1 All E. R. 501; 66 T. L. R. 475. This case was mentioned in the March, 1950, number.

It was held that an optionee is not a volunteer even if the option is created by a will, since he must pay the option price, and he is therefore entitled to the property free from incumbrances and charges, following *Re Wilson*, [1908] 1 Ch. 839.

(Theobald 166.)

It was also held that an option to purchase shares was unaffected by changes made after the testator's death, no principle of ademption applying. The trustees had in one case been paid out on the liquidation of the company, and in the other concurred in an amalgamation. *Re Armstrong*, [1943] 2 All E. R. 537 was followed. There was no reason why the optioner should not enforce his option against the proceeds of sale, to the extent that the option was beneficial.

(Theobald 167.)

Will—Construction—Forfeiture Clause—Gift Over to "Person Next Entitled".—Re Blathwayt's Will Trusts, [1950] 1 All E. R. 582; 66 T. L. R. 669. Land was devised to C. for life, with remainder to his sons in tail, with remainder to J. S., for life, with remainders over. It was provided that if C. became a Roman Catholic the property should go to the "person next entitled, as if C. were dead". C. became a Roman Catholic while unmarried. Later C. had a son. It was held that J. S., and not the son, took the income, during the rest of C.'s life, as J. S. answered the description at the time of forfeiture of C.'s interest. Wynn-Parry, J., left open the question what would happen on C.'s death.

(Theobald 564.)

Administration of Assets—Incidence of Legacies—Law Unchanged.—Re Beaumont's Will Trusts, Walker v. *Lawson*, [1950] 1 All E. R. 802; 66 T. L. R. 712. The order of application of assets in payment of debts does not extend to the payment of legacies. This limitation of A. E. A., 1925, s. 34 (3) has been pointed out in several cases, *e.g.*, *Re Thompson*, [1936] 2 All E. R. 141. The effect is to leave the pre-1926 law in full force. In the instant case legacies were bequeathed and the rest of the estate directed to be divided among four persons, one of whom predeceased the testatrix.

It was held that the legacies were not primarily a burden on the lapsed share but must be borne by all four shares proportionately. The same applied to the duty as the legacies had been bequeathed free of duty, the duty being equivalent to a further legacy.

(Theobald 585.)

Administration of Assets—Incidence of Legacies—What is a Residuary Devise.—Re Ridley, Nicholson v. *Nicholson*, [1950] W. N. 222. The will in this case contained three relevant provisions. Cl. 6 left all the real property to G. N. Cl. 7 left pecuniary legacies. Cl. 8 disposed of "the residue of my property". The sum of debts, specific and pecuniary legacies, estate duties and administration expenses would exhaust the personal estate. It was held that the real estate was primarily exonerated, for two reasons. As a matter of construction it was held that the gift of the real estate free of duties showed that it was only to be resorted to in case the personal estate was exhausted and not otherwise. In the second place it was held that a devise of real property, though general in terms, is not a true residuary gift, following *Re Rowe*, [1941] Ch. 343. This was supported by the language of cl. 8 in the present case, which constituted a true residuary gift. This reflects the old principle that "every devise is specific" and seriously limits the effectiveness of the changes made in the A. E. A., 1925.

(Theobald 585.)

Direction in Will — Unenforceable Purpose Trust — Relief of Trustees from Retrospective Operation of Precedents.—Re Wightwick's Will Trusts, [1950] 1 All E. R. 689; 66 T. L. R. 592. In this case income was left to be applied for an indefinite period to the purposes of an association which has now been held not to be charitable. This created an unenforceable trust, which might validly have been performed had it been limited to the perpetuity period, but which was void in the present case for perpetuity. A gift over, to a true charity, also failed, being limited to vest on failure to apply the income to the first-named purpose at any time, no matter how remote. The residuary legatee took the funds in the event.

(Theobald 412.)

The trustees had been performing the trust in reliance on a ruling that anti-vivisection was charitable. The effect of the ruling in *National Anti-Vivisection Society* v. *I. R. C.*, [1948] A. C. 31 was to invalidate this practice. Wynn-Parry, J., relieved the trustees from liability under the Court's powers in Trustee Act, 1925, s. 61, as they had followed what appeared to be the law.

Will—Valid Determinable Gift—Achievement of Testator's Purpose by Collateral Condition.—Re Chambers (1950), 66 T. L. R. 595. In this case the income of property was left to a non-charitable society so long as it should maintain a grave. Wynn-Parry, J., held that he must follow *Re Chardon*, [1928] Ch. 464, and uphold the gift. The point in these cases is that the fund or income left by the testator is not in any way appropriated to the fulfilment of the condition, and the society could maintain the grave from other resources and, no doubt, by spending much less than the amount of the bequest. Although the subject of an almost unrivalled barrage of academic criticism, *Re Chardon* (*supra*) has been recognised in several other cases, *e.g.*, in *Re Wightwick* (*supra*) where it was distinguished. An interesting point in the report is the reference to the possibility of an appeal to the Court of Appeal, against the rule laid down in *Re Chardon*, in the present case. On any such appeal several important points might be argued, *e.g.*, that the rule against perpetuities ought to apply to a condition where it takes the form of a determinable limitation, in the same way as if it took the form of a proviso or condition precedent, that the Courts have not realised the difference between an ordinary condition and a condition which in effect disposes of a share of the property, and that they might well exercise some control over the kind of condition which might be used, refusing to recognise conditions of an uneconomic or arbitrary kind, which allow the "dead hand" to keep valuable property devoted to objects which benefit neither individuals nor the community.

(Theobald 412.)

Intestacy—Lunatics—Saving Clause A. E. A., s. 51 (2)*—Conversion by Statutory Trust for Sale.—Re Bradshaw*, [1950] 1 All E. R. 643; 66 T. L. R. 579. The Court of Appeal, with a striking dissenting judgment by Jenkins, L.J., has now reversed Danckwerts, J. This is a victory for the school which opposes the

interpretation of changes in conveyancing machinery as altering substantive rights, and, it is felt, should be welcomed. Sir Raymond Evershed, M.R., has carried on the tradition of *Re Warren*, [1932] 1 Ch. 42 and *Re Harvey*, [1947] Ch. 285. A. E. A., s. 51 (2) provides that the old law of intestate succession shall continue to govern the devolution of beneficial interests in land belonging to lunatics (since the lunatic cannot make a will and escape the changes in the law of succession to land introduced in 1925). In *Re Donkin*, [1948] Ch. 74, a share of land devolved in 1928 on a female lunatic under a trust for sale. It was held that it reached her in the form of personal property and could not devolve according to the old law of inheritance of land. In the instant case the lunatic was entitled to a share in land before 1926. On January 1, 1926, it was converted into a beneficial interest in the proceeds of sale, personal property. The Court of Appeal distinguished *Re Donkin* (*supra*) and held that section 51 (2) of the A.E.A. applied and the interest devolved under the old law of inheritance of land.

The learned Master of the Rolls explained the three cumulative conditions which govern the operation of A.E.A., 1925, s. 51 (2): (1) The lunatic already owned the interest in question on January 1, 1926; (2) the lunatic still owned it at his or her death; (3) the beneficial interest would have devolved as real property at or immediately before the coming into operation of the A.E.A., 1925. The words " or immediately before " are the operative words. They obviate the difficult problem of deciding which of two Acts, which came into force together, should have priority. Sir Raymond Evershed referred in particular to the words " . . . lunatic *was* entitled ", and " law in force *before* the commencement of the Act " to support his proposition that A.E.A., s. 51 (2) precedes and overrides the Law of Property Act, 1925. He also referred to cases in which it was recognised that an interest in a share of land was substantially an interest in the land itself. Jenkins, L.J., in his dissenting judgment, objected to the introduction of something not to be found in the Act itself. There was no express saving of the property of lunatics from the operation of the statutory trust for sale under the Law of Property Act. The fact that no saving was made by the A.E.A., 1925, for a lunatic's personal property suggested that there was no general policy in the legislation, though the learned Lord Justice recognised that the changes in the intestate succession laws were less drastic in the case of personal property. He also objected to the equation of " beneficial interest in land " with the benefit of a trust of land, holding the former to mean the equitable, as distinct from the fiduciary legal, title to the land. Although the reasoning of the dissenting judgment is, with respect,

technically preferable any escape from the vicious effects of the doctrine of conversion on beneficial interests should be welcomed.
(Theobald 568.)

Wills—Construction—Annuity—Making up Deficiency in Subsequent Year.—Re Carey, [1950] 1 All E. R. 726; 66 T. L. R. 802. A testator left his daughter the income of a fund up to £1,000 p.a., with gifts of the balance, if any, to others. For some years less than £1,000 was in fact produced. It was argued that the difference might be made good from income surpluses over £1,000 in later years. Danckwerts, J., held that the testator visualised distinct annual apportionments which were not to be run together, and the claim failed. If the testator had given the daughter a fixed annuity of £1,000 charged on the income there would have been no claim against surpluses for deficiencies, and this was a much weaker case, depending more precariously on the actual income produced. *Re Coller's Deed Trusts*, [1937] 3 All E. R. 292, was applied.
(Theobald 355.)

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4. *FAMILY LAW CASES*

By C. E. P. DAVIES, M.A., B.C.L., of the Inner Temple, Barrister-at-Law

Petition for declaration of legitimacy—onus of proof that petitioner's parents not already married to anyone else when petitioner was born—inference of continuance of life.—In *MacDermaid* v. *Att.-Gen.* (1950), 66 T. L. R. 543, Hodson, J., decided that the onus of proving in a petition for a declaration of legitimacy that the petitioner's parents were not married to anyone else at the date of her birth, as required by section 1 (2) of the Legitimacy Act, 1926, was upon the petitioner.

The petitioner was born on March 14, 1894; her father (Cadogan Thomas) and mother (Elizabeth Ann Thomas) were married on March 10, 1925; but her father had previously married Rosa Johnstone on June 24, 1886, who had been last seen by Cadogan Thomas's brother at the skating rink at Olympia in about 1891, and had not been heard of since. The petitioner argued that the Legitimacy Act, 1926, cast no onus upon her to prove that Rosa Johnstone was dead at the date of her birth in 1894 and that, as

the matter was left in doubt by the evidence, she was entitled to succeed. But it was contended for the Attorney-General that section 1 (2) of the Act created a condition precedent to the operation of the section and imposed upon the petitioner the onus of proving that her father's previous wife was not living at the date of her birth before the rest of the section could come into effect. Hodson, J., accepted the latter view, and held that the petitioner had not discharged this burden by showing that her father's previous wife had been last heard of about three years before her birth. When a person has not been heard of by those who would normally have heard of him if alive he will be presumed dead after a lapse of seven years (*Nepean* v. *Doe d. Knight* (1837), 2 M. & W. 894) and it is doubtful whether absence abroad is necessary to raise this presumption, particularly in these days when the return journey to Rome can be accomplished in less time that it takes to get from London to Newcastle. But no presumption of death arises upon proof that a person has not been heard of for any shorter period, nor, on the other hand, is there any presumption that a person continues alive for seven years from the time when he was last heard of; death, or continuance of life, in these circumstances are matters to be inferred from the facts, and the inference may be strong or weak according to the circumstances obtaining at the time when the person was shown to have been last alive. In the present case, Rosa Johnstone was in good health when she was last seen at the skating rink at Olympia in 1891, though she was said to have " aged somewhat ", and the inference which the Court drew was that she continued alive until the birth of the petitioner in 1894.

Divorce—husband domiciled abroad and wife in England at time of marriage—marriage declared void ab initio by court of husband's foreign domicil—whether foreign decree recognised in England.—In *Chapelle* v. *Chapelle*, [1950] 1 All E. R. 236, Willmer, J., delivered at Manchester reserved judgment in a case argued before him about a month earlier at Liverpool. A man domiciled in Malta married at a Register Office in England in 1931 a woman domiciled in England who had previously been divorced. Both before and after the marriage the wife lived in Malta until in 1941 she returned to England. In 1944 the husband obtained in the Maltese Court a decree pronouncing the marriage void *ab initio* for failure to comply with the Canon Law. In 1945 the husband acquired an English domicil and now petitioned in England for a decree of divorce on the grounds of his wife's

desertion and adultery. The issue for decision in the present case was the validity of the decree of the Maltese Court in 1944. There was the authority of *Salvesen* v. *Administrator of Austrian Property*, [1927] A. C. 641, followed in *De Massa* v. *De Massa*, [1939] 2 All E. R. 150 note and *Galene* v. *Galene*, [1939] P. 237, for recognition in England of a decree of nullity of a foreign court of the common domicil of the parties, but in *White* v. *White*, [1937] P. 111 the *Salvesen Case* was distinguished by Bucknill, J., at p. 123 on the ground that it only applied where both parties to the marriage had a common domicil. In the present case the parties had separate domicils before the marriage. Willmer, J., said that if both parties had had a Maltese domicil when the nullity proceedings were initiated in the Maltese Court, the Maltese decree would be conclusive. "If I accept the premise, namely, that both parties in this case were domiciled in Malta at the time of the commencement of the Maltese proceedings, I have no doubt that the conclusion contended for by the wife would follow, and I should be bound on the authorities to hold that the decree of nullity pronounced by the Court in Malta is conclusive" (at p. 238). There was no doubt that when the nullity suit was brought the husband was domiciled in Malta. The question therefore was whether his wife had acquired such a domicil. It was submitted on her behalf that she had acquired a domicil of choice in Malta by living there with her husband with the intention of remaining permanently, which she retained until the commencement of the nullity proceedings in the Maltese Court, but the husband alleged that his wife had deserted him and had left Malta for good before the nullity proceedings were brought. The facts upon which this disputed issue depended were not fully before the Court and no decision upon it was possible. An alternative claim on the wife's behalf was that she had acquired a Maltese domicil by her marriage. It is important to observe that the Maltese Court had declared the marriage void *ab initio*, and not merely voidable; had the marriage been voidable it would have remained extant for certain purposes until the date of the decree (*Fowke* v. *Fowke*, [1938] Ch. 774, *Dodworth* v. *Dale*, [1936] 2 K. B. 503; but compare *Newbould* v. *Att.-Gen.*, [1931] P. 75) and the wife would have acquired her husband's domicil (*Turner* v. *Thompson* (1888), 13 P. D. 37, *De Reneville* v. *De Reneville*, [1948] P. 100, at p. 111). But the marriage having been declared void *ab initio* by the Maltese Court, Willmer, J., adopted what Professor Cheshire (*Private International Law*, 3rd ed., p. 464) describes as "the familiar argument . . . that to attribute the (Maltese) domicil to the woman is to beg the question of domicil" and said (at p.

240) " I hold . . . that this Court will not accept as binding a decree of the Court in Malta which, by its very terms, destroys the one and only ground on which the claim to exercise jurisdiction over the wife could be based. I do not think that the wife can, at one and the same time, claim a common domicil with her husband in Malta, and yet rely on the decree of the Maltese Court which destroys the foundation on which that claim is based ". The apparent logic of this has not saved the decision from criticism on the grounds that the foreign decree of nullity should not have been given this retrospective operation, and also that, even if it were, and the wife did not acquire her husband's domicil by marriage, the nullity decree pronounced by the Court of the domicil of the husband alone should have been accepted by the English Court. (See notes by Mr. Geoffrey Cross in *International Law Quarterly* (April, 1950) vol. 3, p. 247.) But in so far as the judgment decides that the wife did not acquire her husband's domicil by the void marriage it is in accordance with *Mehta* v. *Mehta*, [1945] 2 All E. R. 690, where the English Court granted a decree nisi of nullity declaring void a marriage in Bombay between a woman domiciled in England and a Hindu domiciled in India. The wife had been induced to believe that what was in fact a Hindu marriage was merely a ceremony to receive her into the Hindu faith, and the English Court assumed jurisdiction on the ground that the wife's domicil remained English.

(Latey, pp. 48, 398.)

Divorce—Standard of proof in petitions on ground of Adultery. —In the last number of *The Conveyancer* (March, 1950, Vol. 14, p. 78) the writer of these notes commented upon *Davis* v. *Davis*, [1950] 1 All E. R. 40 (a petition for divorce on the ground of cruelty) in which Denning, L.J., pointed out that section 178 (2) of the Judicature Act, 1925 (as amended by the Matrimonial Causes Act, 1937, s. 4) enabled the Court to pronounce a decree of divorce if " satisfied on the evidence that the case for the petition has been proved ", which put the burden of proof upon the person making the allegation, but not a burden of extraordinary weight. It was suggested that this reasoning would make the higher " criminal " standard of proof unnecessary also in petitions for divorce on the ground of adultery, though the decision in *Ginesi* v. *Ginesi*, [1948] p. 179 had been treated as requiring this standard in such cases. Subsequently Denning, L.J., dealt with this matter in *Gower* v. *Gower*, [1950] 1 All E. R. 804, where he gave

additional reasons why *Ginesi* v. *Ginesi* should be re-considered when the occasion arose. First, he said, *Ginesi* v. *Ginesi* was not fully argued, as counsel conceded that the standard of proof of adultery was the same as in a criminal case. Secondly, the decision in *Mordaunt* v. *Moncrieffe* (1874), L. R. 2 Sc. & Div. 374 was not cited, in which it was decided by the House of Lords, after consultation with the Judges, that a petition for divorce against a wife might proceed notwithstanding that the respondent was insane at the time when the petition was served upon her, and that, in this respect, there was no analogy between divorce and criminal proceedings. Also the High Court of Australia in *Wright* v. *Wright*, [1948] 77 C. L. R. (2) 191 had decided, contrary to *Ginesi* v. *Ginesi*, that on a charge of adultery in divorce proceedings the criminal standard of proof was not required. With this weight of argument against it, the principle decided in *Ginesi* v. *Ginesi* must be regarded as having doubtful validity.

(Latey, p. 69, Supplement.)

Divorce—Discretion of Court as to costs against respondent Wife—In *Gower* v. *Gower*, [1950] 1 All E. R. 804, discussed in the previous note, the Court of Appeal reversed a decision of the Court below based upon an erroneous inference from proved facts, drawing a distinction between such a case and one where the Court would not interfere because the Judge had merely accepted the account given by one witness rather than another. But in *Barker* v. *Barker*, [1950] 1 All E. R. 812, the Court declined to interfere with the exercise by a Divorce Commissioner of his discretion to refuse a successful husband petitioner costs against his wife mainly, though not exclusively, on the ground that he had ignored his wife's entreaties to have her back and had told her to "stop pestering him". The Court said that this alone would have been an insufficient ground for depriving the husband of costs. "If it was apparent that this was the only reason, I should be disposed to think that it was not a valid reason" (Bucknill, L.J., at p. 815). "If a petitioner was deprived of costs by reason only of the fact that he did not forgive and take back a wife in these circumstances, I would have said this was in itself no reason" (Somervell, L.J., at p. 817). It was, however, not apparent from the transcript what reasons induced the Commissioner to refuse the petitioner his costs and the Court of Appeal declined to alter the decision which he made in the exercise of his discretion. But they went on to suggest some reasons which might be considered adequate for

giving costs against a wife, such as that she had considerable means (Lord Penzance in *Milne* v. *Milne & Fowler* (1871), L. R. 2 P. & D. 202 at p. 204. Sir James Hannen, P. in *Milward* v. *Milward* (1887), 57 L. T. 569 at p. 570); or had done something in the suit to increase the husband's costs; and, conversely, reasons which might be considered adequate for depriving a successful husband petitioner of his costs, such as that the husband, without being guilty of conduct conducing to the offence, had been in part responsible for the break up of the marriage, or was glad to be free. The Court also expressed the opinion that section 1 of the Law Reform (Married Women and Tortfeasors) Act, 1935, was not alone sufficient to justify the Court in giving costs against a guilty wife, though it had been suggested in *Tickle* v. *Tickle* (1945), 114 L. J. Probate 29 that this section might have been a sufficient reason without proof of the wife's separate means.

(Latey, p. 258.)

Divorce—wife's petition—petitioner entitled to maintenance under previous order of court of summary jurisdiction—statement by counsel at hearing of petition that no application for maintenance would be made—whether statement binding upon petitioner. —*Ross* v. *Ross*, [1950] 1 All E. R. 654 was an application for maintenance under the Judicature Act, 1925, section 190 (2) by a wife who had previously obtained a decree nisi of divorce. Before the proceedings for divorce were commenced the wife had obtained an order from a court of summary jurisdiction for payment by her husband of maintenance for herself and her child on the ground of desertion and wilful failure to maintain and at the conclusion of the hearing of the petition for divorce counsel told the Court there would be no question of maintenance as the wife proposed to rely upon the magistrates' order. Subsequently, however, two days before the expiration of two months from final decree within which an application for maintenance under section 190 (2) of the Judicature Act, 1925, has to be made by rule 44 (1) of the Matrimonial Causes Rules, 1947, the wife filed an application for maintenance under section 190 (2). At the hearing the husband alleged that she had previously elected to rely upon her remedy under the order of the court of summary jurisdiction and could not subsequently claim maintenance in the High Court. But Willmer, J., decided that the wife's application was not thus barred, on the grounds (1) that her counsel's statement at the hearing of the petition for a decree nisi did not amount to a final and irrevocable

election on her behalf, but was only a statement of existing intention, and (2) that, in any case, the principle of election only applied where a plaintiff had alternative and inconsistent remedies, and in the present case the wife had only one remedy, namely an order for maintenance against her husband, though a choice of courts in which to pursue it. But apart from the doctrine of election, Willmer, J., also decided in favour of the wife on an independent ground. In *Hyman* v. *Hyman*, [1929] A. C. 601, the House of Lords decided that a wife's consent in a separation deed not to take proceedings against her husband for maintenance beyond the provisions made for her in the deed did not preclude her from petitioning for maintenance under section 190 (2) of the Judicature Act, 1925, because that provision was "not made solely in the interests of the wife, but also in the interests of third parties who may deal with the wife and who may, as in the case of Poor Law Guardians, become responsible for her subsistence" (Lord Hailsham, L.C., at p. 608), and therefore could not be evaded by the parties. The Court of Appeal held recently in *Gaisberg* v. *Storr*, [1950] 1 K. B. 107, upon the same ground, that a written undertaking by a husband to pay his wife £3 a week as from the date of the decree nisi was unenforceable. Accordingly, Willmer, J., held in the present case that, as it was not competent for the wife by agreement to contract out of her statutory right to claim maintenance under section 190 (2) of the Judicature Act, 1925, so also it was not competent for her to renounce such right by any unilateral statement or conduct on her part, at least up to the limit of time allowed by the rules for preferring a claim for maintenance. But the Court, having decided substantially in favour of the wife, then applied the rule in *Kilford* v. *Kilford*, [1947] 2 All E. R. 381 that a wife cannot obtain an order for maintenance in the High Court while at the same time retaining in force an order previously obtained from a court of summary jurisdiction, and adjourned the application for 28 days to enable the wife to obtain the discharge of the justices' order, with liberty to renew the application for maintenance under section 190 (2) of the Judicature Act, 1925, if the justices' order had been discharged.

(Latey, 382, Supplement.)

Divorce—connivance—alleged motive to obtain evidence.—Bucknill, J., rightly said in *Manning* v. *Manning*, *Fellows* v. *Fellows*, [1950] 1 All E. R. 602, at p. 605 that "No useful purpose is served in considering what in one case did constitute connivance

and in another case did not ". But the cases are instances of the principle that connivance will not be excused because its alleged purpose is procurement of evidence of adultery. Mr. Manning installed a microphone in the piano in his sitting-room connected with headphones in the garage and on September 21, 1948, he, with Mrs. Fellows and a detective, used this apparatus to listen to an indecent conversation between Mrs. Manning and Mr. Fellows in the sitting-room. They went in, but on this occasion obtained no evidence of adultery. Subseqently Mr. Manning and Mrs. Fellows behaved as though nothing had happened and allayed suspicion which might otherwise have arisen in the minds of Mrs. Manning and Mr. Fellows. Then, on October 2, 1948, Mr. Manning having told his wife that he was going to stay the night with his father, and Mrs. Fellows having told her husband that she was going to nurse her sick father, Mr. Manning with some friends again listened in the garage and on this occasion obtained evidence of adultery between Mrs. Manning and Mr. Fellows. Willmer, J., dismissed the petitions for divorce of Mr. Manning and Mrs. Fellows on the ground of connivance and the petitioners appealed alleging that there could not be connivance if the action of the petitioner was taken to obtain proof of adultery. But the appeals were dismissed, Bucknill, L.J., saying (at p. 603) that " as regards Mr. Manning's only desire being to find out whether the wife was unfaithful. . . . I think that his desire is immaterial ". The motive for connivance was therefore disregarded in these cases, which is in accordance with the *dictum* of Lord Penzance in *Ross* v. *Ross* (1869), L. R. 1 P. & D. 734, at p. 738, that if it were established that a wife consented to her husband's continuing an adulterous intercourse in order to obtain an allowance, her consent would still amount to connivance. But there was other evidence of connivance which justified dismissal of the appeals.

(Latey, 113.)

Divorce—collusion—negotiations for maintenance while petition pending—agreement for payment to wife petitioner on decree nisi—alleged motive to make provision for wife on dissolution of marriage which she would have received under husband's will if marriage had continued—necessity for full disclosure.—In *Lowndes* v. *Lowndes*, [1950] 1 All E. R. 999, the issue was one of collusion arising out of negotiations between husband and wife for maintenance. In October, 1948, Mrs. Lowndes filed a petition for divorce

on the ground of her husband's cruelty. The husband by his answer denied the allegations of cruelty, and cross-petitioned for divorce on the ground of his wife's cruelty, but in May, 1949, his answer was struck out on the wife's application, which was not opposed as the husband since filing his answer had decided to remarry if his existing marriage was dissolved. On July 27, 1949, Mrs. Lowndes was granted a decree nisi, and on July 26 her husband's brother (Mr. Roy Lowndes) had executed a declaration of trust under which he deposited £2,000 with a trustee in trust to pay that amount to the wife if the decree was granted but, if not, to repay it to him. The money was paid to the wife upon the decree nisi, and was refunded by the husband to his brother. Subsequently, however, Mrs. Lowndes, being jealous of the woman her husband was going to marry, did not apply for the decree nisi to be made absolute, and informed the King's Proctor of the £2,000 transaction. The husband then, in order to be heard, himself took out a summons calling upon his wife to show cause why the decree nisi should not be made absolute. On this summons the King's Proctor was heard, and Willmer, J., rescinded the decree nisi on the ground of collusion. This procedure was not provided for by the Rules, which only enabled the King's Proctor to intervene when application for a decree absolute was made by the petitioner, but under the Judge's direction, counsel for each party was heard and counsel for the King's Proctor appeared to assist the Court. The husband's account of the transaction involving the £2,000 was that, had the marriage continued, he intended to leave his wife a sum of money by will and, in view of the impending divorce, he wished to make a similar provision for her on dissolution of the marriage. It was argued for the husband that collusion required an element of corruption or perversion of justice which was not present in this case. Since the Matrimonial Causes Act, 1937, it had been legitimate to prefer claims for maintenance on behalf of a wife at any time after presentation of the petition; accordingly there could be nothing improper in conducting negotiations for maintenance at any stage of the proceedings, and all that the husband had done here was to agree to pay in respect of maintenance what the wife would be legally entitled to recover if the petition succeeded, which could not be regarded as tending to pervert the course of justice. But Willmer, J., pointed out that these negotiations went beyond mere provision of maintenance for the wife if a decree was granted and included arrangements for payment to be made in consideration of the case being proceeded with, which was clearly collusive as being an agreement providing for conduct of the suit. Moreover, in the present case payment

was made before the decree nisi, whereas no claim for maintenance (whether the amount was agreed or not) could be enforced until after a decree nisi had been pronounced. Willmer, J., also said that in all cases where there had been negotiations for maintenance while proceedings were pending, full disclosure of the negotiations should be made to the Court, which had not been done in the present case until the wife herself gave information to the King's Proctor.

(Latey, 121.)

Nullity—petition on ground of wilful refusal to consummate marriage—coitus interruptus—decree of divorce granted on ground of cruelty.—In *Cackett* v. *Cackett*, [1950] 1 All E. R. 677, the question whether continuous practice by a husband of *coitus interruptus* throughout the marriage against the wishes of his wife would enable the Court to grant a decree of nullity on the ground of wilful refusal to consummate arose again for decision, having been previously considered in *Grimes* v. *Grimes*, [1948] P. 323 (May 10, 1948), and *White* v. *White*, [1948] P. 330 (May 11 and 12, 1948), with inconsistent results. It is common ground that this matter was deliberately left undecided in *Baxter* v. *Baxter*, [1948] A. C. 274, where Viscount Jowitt, L.C., said (at p. 283) : " I wish to make an observation on one practice referred to in this summary of facts, namely, that of withdrawal before emission, or *coitus interruptus*. This practice, as distinct from artificial methods of contraception, does not arise in the case before the House, and I prefer to express no opinion about it ". In *Grimes* v. *Grimes*, Finnemore, J., granted a decree of nullity on this ground, applying the principle laid down by Dr. Lushington in *D.* v. *A.* (1845), 1 Rob. Ecc. 279 at p. 298, to determine the meaning of " sexual intercourse " for the purpose of a decree of nullity on the ground of incapacity to consummate the marriage that " sexual intercourse, in the proper meaning of that term, is ordinary and complete intercourse ; it does not mean partial or imperfect intercourse ", and holding that there was no difference in this respect between a decree of nullity on the ground of incapacity under the ecclesiastical law and a decree of nullity for wilful refusal to consummate under section 7 (1) (a) of the Matrimonial Causes Act, 1937. " It is true that we are not dealing with a case where the respondent is incompetent or incapable, but where he has wilfully refused to perform a sexual act which is the full act of intercourse consummating the marriage. I have come to the

conclusion that intercourse must equally be full and natural intercourse whether the case is one of incapacity or one of wilful refusal. I hold that *coitus interruptus* is not a full and natural intercourse, but, by its very nature, a partial and incomplete intercourse" (Finnemore, J., at p. 329). In *White* v. *White* the facts were identical, but the decision different; Willmer, J., refused a decree of nullity, but granted a decree of divorce on the ground of cruelty, and explained his reasons for differing from Finnemore, J., on the question of nullity. He pointed out that in *D.* v. *A.* Dr. Lushington drew a clear distinction between conception and *coitus* and, though he granted a decree of nullity, said he would not have done so if the wife who petitioned could have been made capable of *vera copula.* The question whether conception was possible was, in his view, immaterial. This decision was followed by Horridge, J. in *L.* v. *L.* (1922), 28 T. L. R. 697, and both the decisions were accepted by the House of Lords in *Baxter* v. *Baxter,* which established the principle that marriage was consummated if there was *coitus* though without the possibility of conception taking place. From this reasoning it followed that there was such consummation in *White* v. *White,* though the *coitus interruptus* practised may have made conception impossible. "It is submitted on behalf of the wife that there is no *vera copula* unless there is not only full entry and penetration, but also completion of the act within the body of the woman, whether with or without the use of mechanical contraceptives. On the other hand, it is contended that there is a complete conjunction of bodies, a *vera copula*—which means literally 'true conjunction'—as soon as full entry and penetration has been achieved. What follows goes merely to the likelihood or otherwise of conception. In my judgment, the latter contention must be correct; it seems to me to follow from the reasoning of the House of Lords in *Baxter* v. *Baxter*" (Willmer, J., at p. 338). In *Cackett* v. *Cackett,* where the facts were similar to those in *Grimes* v. *Grimes* and *White* v. *White,* counsel for the wife petitioner again attempted to persuade the Court that consummation, in the words of Viscount Jowitt, L.C., in *Baxter* v. *Baxter* (at p. 290) "as that word is understood in common parlance and in the light of social conditions known to exist", meant sexual intercourse followed by the emission of seed into the body of a woman, but was again met with the opinion of Dr. Lushington in *D.* v. *A.*, that the possibility of conception, as opposed to the possibility of penetration, was immaterial. But a fresh point was made for the petitioner in the case of *Cackett* which was not mentioned either in *Grimes* or *White*; that, though *Cowen* v. *Cowen,* [1946] P. 36 was overruled by *Baxter* v. *Baxter* in so far as it decided that a decree of nullity for wilful refusal to

consummate a marriage might be granted on the ground that the husband insisted on using contraceptives contrary to his wife's wishes, the case also decided that insistence by the husband on *coitus interruptus* might justify a decree of nullity, and that, to that extent, it was unaffected by *Baxter* v. *Baxter*. Hodson, J., disposed of this new argument by pointing out that the conception of consummation adopted in *Cowen* v. *Cowen* was based upon the view of Dr. Lushington in *D.* v. *A.* as to the meaning of "sexual intercourse", which had been shown in *Baxter* v. *Baxter* to relate only to the case he was then deciding, one of incapacity to consummate a marriage on account of the wife's malformation, and was no authority on the question of consummation for the purpose of a decree of nullity on the ground of wilful refusal to consummate. Therefore, the whole foundation of the decision in *Cowen* v. *Cowen* having been destroyed, that case had no longer any authority, and the matter was completely open. Hodson, J., in the case of *Cackett* refused a decree of nullity, following the reasoning of Willmer, J., in *White* v. *White* in preference to the contrary decision in *Grimes* v. *Grimes*, but granted a decree *nisi* of dissolution on the ground of cruelty. This debatable issue may eventually be argued in a higher Court, and it is desirable that it should be for there is much to be said on both sides, but, in the meantime, the weight of opinion must be in favour of the view accepted in the cases of *White* and *Cackett*.

(Latey, 174.)

Marriage contracted in Soviet Union between husband domiciled in England and wife domiciled in the Union—whether invalid for failure to comply with Soviet form.—While the proofs of these notes were being read judgment was given by the Court of Appeal in *Kenward* v. *Kenward* (1950), "The Times" Newspaper, June 9, reversing the decision of Hodson, J., in *Kenward* v. *Kenward*, [1950] P. 71, noted in the last number of *The Conveyancer* (March, 1950, Vol. 14, p. 79). The marriage between the petitioner Mr. Kenward, who was serving with the Royal Navy in Archangel, and the respondent, a Russian girl, was solemnised in the U.S.S.R. in October, 1945, and registered in accordance with an amendment of the Soviet marriage law which came into force in April, 1945, making registration compulsory. But certain other formalities required by Soviet law had not been complied with; in particular the Registrar had not called for a declaration of the mental and physical condition of the parties, did not read to them the provisions of the Soviet Code which he

was required to read, and made no entry of the marriage in the parties' passports or elsewhere. Article 2 of the Soviet Code of 1926 provides that registration of a marriage shall be conclusive evidence of its existence, and this had been treated by Hodson, J., as a rule of substantive law and therefore conclusive against the argument that the act of registration was invalid for failure to comply with the formalities required. But on appeal the Master of the Rolls considered the Article to be no more than a rule of evidence and therefore not binding upon the English Court. This is in accordance with the principle illustrated by Lord Brougham in *Bain* v. *Whitehaven Ry.* (1850), 3 H. L. Cas. 1, at p. 19 : " Whether a witness is competent or not, whether a certain matter requires to be proved by writing or not, whether certain evidence proves a certain fact or not, that is to be determined by the law of the country where the question arises ". Having thus disposed of the " conclusive evidence " Article of the Soviet Code, the Master of the Rolls drew attention to the Soviet Edict of April 2, 1947, prohibiting, absolutely, marriages between Soviet nationals and aliens and to the further fact that the Soviet Government had prevented the parties to this marriage from ever rejoining each other, and decided that the Soviet formalities had not been complied with and in all the circumstances there was here no marriage at all. The appeal was allowed on the issue of invalidity of the marriage for failure to comply with the Soviet form, and the Master of the Rolls said he was unable to decide that the marriage was void for absence of consent, and expressly left open the question whether the doctrine of frustration was applicable to a contract of marriage.

(Latey, 17.)

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5. *DEATH DUTY CASES*

By L. J. STEIN, Barrister-at-Law

Estate duty—determination of life interest—whether deceased entirely excluded from any benefit—interposition of company—Finance Act, 1940, *ss.* 43, 56 (2).—In *Att.-Gen.* v. *St. Aubyn Estates, Ltd.*, [1950] 1 All E. R. 951, the Court of Appeal did not disapprove (though it did not expressly affirm) the decision of Croom-Johnson, J. (see note in Volume 13, p. 396) that the Crown's claim to estate duty under section 43 of the Finance Act, 1940, could not be sustained by reference to that section taken alone, but

it came to a different conclusion as to the effect of section 43 read together with section 56. The decision is interesting and important as illustrating, together with that in the other *St. Aubyn Case* (see note, *ante*, p. 83), the operation of sub-section (2) of section 56, which is applicable where a privately controlled company has been concerned in the disposition or determination of a life interest, or in any of a group of " associated operations " of which such disposition or determination was one. In such a case the conditions as to the entire exclusion of the deceased and of any benefit to him are to be treated as having been satisfied " if, and only if, they would have been treated in the circumstances aforesaid ", the reference being to the provisions of section 56 (1). In the *St Aubyn Case*, above, Jenkins, L.J., in delivering the judgment of the Court, observed, in language notable for its restraint, that " the terms of section 56 (2) are far from being a model of clarity and . . . demand a feat of imagination by no means easy to perform ". What has to be imagined is, apparently, that the assets of the company were held in trust for its members and for any other person to whom it was under any liability other than one incurred exclusively for the purposes of its business, and that the company acted as trustees only, with power to carry on, and employ its assets in, the business of the company. The essence of the somewhat complicated facts of the *St. Aubyn Case*, above, was as follows : The deceased had had a life interest in certain settled property consisting of land, equitable interests representing former undivided shares in land, and investments. A company had been formed and the whole of the settled property had been agreed to be sold to it, partly for cash and partly for £750,000 payable by forty half-yearly instalments. Ordinary shares had been allotted to the trustees or their nominees. The deceased had been allotted 100,000 7 per cent £1 preference shares and, while still life tenant, had paid for them in cash. The gist of what next happened is that, in exercise of a power vested in the deceased jointly with another person, the sum of £100,000 out of the cash receivable by the trustees, and also the right to receive the £750,000 payable by instalments, were appointed to be held in trust absolutely for the deceased, while the rest of the settled property now represented by the ordinary shares allotted to the trustees (hereinafter called " the trustees' shares ") was appointed to be held on trusts in which the deceased had no beneficial interest. All this had happened outside the statutory period, but on the death of the deceased estate duty was claimed, nevertheless, on the value of the trustees' shares. The transactions amounted, in effect, to no more than the familiar carving up of a trust fund

between life tenant and remainderman, but this had been effected through the medium of a company, with the result that section 56 (2), with its statutory hypothesis, came into play. The question to be decided was whether, on that hypothesis, the trustees' shares could be said, from the time of the relevant disposition or determination, to have been held by the trustees to the entire exclusion of the deceased and of any benefit to him. Applying the language of the statutory hypothesis as best it could, the Court was of opinion that immediately before the exercise of the power of appointment resulting in the extinction of the deceased's life interest in the trustees' shares, the company must be imagined to have held its assets (1) on trust to pay to the trustees £750,000 by instalments, and (2) subject thereto, to pay to the deceased, on whatever future event might be supposed to correspond to a winding-up, the amount paid up on his preference shares, *viz.*, £100,000 and, pending that event, interest thereon at 7 per cent, and, finally, (3) subject to the foregoing trusts, on trust absolutely for the trustees for the purposes which had been prescribed by the deceased and his co-appointor, which purposes did not include any benefit to the deceased. In considering whether, in relation to the residue of the settled property, *i.e.*, the property represented by the trustees' shares, the condition of entire exclusion could be said to be satisfied, the Court was content to disregard the rights of the deceased in respect of the preference shares. The question on which it fastened was whether, on the statutory hypothesis, the deceased had, in relation to the residue of the settled property, retained a benefit in the shape of his right to receive the instalments of the £750,000. It was held that he had. But for the statutory hypothesis, this right would have been a separate item of property, and all that had happened would have been that the deceased's life interest in it had been enlarged into an absolute interest. On the statutory hypothesis, however, the right to the instalments represented simply an equitable interest in the entirety of the settled property, from which it followed that the condition of entire exclusion was not satisfied. As against this reasoning, it was contended, on behalf of the taxpayer, that the property in which the life interest subsisted immediately before the relevant disposition should be considered to be, not the entirety of the settled property, but only the residue remaining after providing for prior interests under the statutory trusts notionally created by the statutory hypothesis To this it was replied that, even assuming the position to be as stated, the right to receive the instalments was so clearly related and referable to the determination of the life interest in the residue

that the condition of entire exclusion must still be held not to be satisfied. In this connection, the Court observed that *Seccombe's Case*, [1911] 2 K. B. 688, was not to be interpreted as deciding that the benefit must be the contractual consideration for the determination of the life interest; all that was required was that the benefit should arise under some legally enforceable arrangement. Though in this case the right to receive the instalments was not one side of a bargain of which the other side was the determination of the life interest, it was legally enforceable, and this, combined with the obvious fact that it was connected with and referable to the determination of the life interest, was sufficient. Having held that the trustees' shares must be deemed to pass on the death under section 43 of the 1940 Act in combination with section 56 (2), the Court found it unnecessary to express a concluded opinion on an alternative claim to duty under section 46 on the footing that the deceased had made a transfer of property to, and received benefits from, the company. This part of the case raised a number of questions which were mentioned but not decided. Seeing that section 59 of the 1940 Act defines " payment " as including " a transfer of property ", can a cash payment be, itself, a transfer of property within the meaning of section 46? Do periodical loans rank as " benefits " within the meaning of sections 46 and 47? If so, how is the value of the " benefit " represented by a loan to be computed? These and some other obscurities of the group of provisions commencing with section 46 were left to be explored if and when it should become necessary to deal with them. The Court gave leave to appeal to the House of Lords and more may be heard of the case.

Estate duty—continuing annuity—death of one annuitant survived by another—Finance Act, 1894, *ss.* 1, 2 (1) (*b*).—The decision of Wynn-Parry, J., in *Re Duke of Norfolk's Will Trusts*, [1949] 2 All E. R. 701 (see note, *ante*, p. 86) has been affirmed by the Court of Appeal, [1950] 1 All E. R. 664.

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6. *LANDLORD AND TENANT CASES*

By J. Muir Watt, M.A., of the Inner Temple, Barrister-at-Law

Rent Restrictions Acts—tenancy at rent less than two-thirds of rateable value—sub-tenancy—termination of tenancy—position of sub-tenant—sub-tenant not protected.—The decision in *Knightsbridge Estates Trust, Ltd.* v. *Deeley*, [1950] 1 All E. R. 577, is a

most interesting one, which settles a point upon which there has been some discussion but, hitherto, no decision. The short point is, what is the position of a sub-tenant where the head tenancy is excluded from the Rent Acts by section 12 (7) of the 1920 Act, because the rent of the head tenancy is less than two-thirds of the rateable value. Is the sub-tenant protected by section 5 (5) or section 15 (3) of the 1920 Act? The answer which the Court of Appeal has now given in *Deeley's Case* is, "No". As a result of section 12 (7) the head tenancy is to be treated for the purpose of the Act as if it did not exist and never had existed. That being so, the tenant's interest cannot be "determined" within the meaning of section 15 (3), for that which never exists can never come to an end. The protection given to lawful sub-tenants where the head tenancy determines cannot, therefore, apply.

The position of the head landlord in relation to the sub-tenant, when the head lease comes to an end, is the same in this case as in *Cow* v. *Casey*, [1949] 1 K. B. 474. In neither case is the head tenancy within the Acts—in *Cow* v. *Casey* because the premises comprised in it are outside the Acts, in *Deeley's Case* because the head tenancy itself, though not the premises, is outside the Acts by virtue of section 12 (7). In both cases the head landlord is entitled to receive his property back unencumbered by statutory sub-tenancies. Asquith, L.J., in the present case expressed the opinion that the impact of section 12 (7) upon section 15 (3) was unintended and unjust. Roxburgh, J. (wisely, it is suggested) preferred to reserve his view on this point, which did not affect the question of construction.

(Rent Restrictions Guide, 3rd ed., pp. 11, 106–109.)

Rent Restrictions Acts—"landlord by purchasing"—landlord by purchase grants tenancy of reversion to husband—husband tainted with the same disability.—Lucas v. *Lineham*, [1950] 1 All E. R. 586, is a case of some interest on the application of the "landlord by purchasing" provision of para. (*h*) of Schedule I of the 1933 Act. The plaintiff's wife admittedly became landlord by purchasing. She, however, granted a lease of the house for three years to the plaintiff, subject to the defendant's statutory tenancy. Now *Powell* v. *Cleland*, [1948] 1 K. B. 262, decided that "purchasing" did not cover the creation of a tenancy of the reversion, which was what the plaintiff's wife had created in the present case. The tenant could not, therefore, resist an action for possession on this particular ground. He succeeded, however, on the ground, recently

illustrated in *Littlechild* v. *Holt*, [1950] 1 K. B. 1, that the disability of a landlord who became a landlord by purchasing will bind his successor. In the present case the landlord, although he did not himself " purchase " within the meaning of para. (*h*), derived title from a predecessor who did purchase in this sense. He could not, therefore, be in a better position *vis-à-vis* the tenant than his predecessor.

(Rent Restrictions Guide, 3rd ed., p. 93.)

Rent Restrictions Acts—lawful and unlawful sub-letting within section 15 (3) *of* 1920 *Act—position where sub-letting is in breach of contract but the letting contains no proviso for re-entry—view expressed that sub-letting is unlawful—principles laid down as to effect of acceptance of rent after breach of covenant in the case of contractual and statutory tenancies.*—The main point of interest in *Carter* v. *Green*, [1950] 1 All E. R. 627, is probably the opinion expressed (*obiter*) by the Court of Appeal that Morton, L.J., was right in his opinion (also *obiter*) in *Maley* v. *Fearn* (1946), 176 L. T. 203, 206, that a sub-letting which is in breach of covenant is " unlawful " for the purposes of section 15 (3) of the 1920 Act although it does not give rise to a right of re-entry owing to the fact that the covenant does not constitute a condition, and that there is no express forfeiture clause. The opinion of the Court was *obiter* in the present case because the Court held that, even if the sub-letting has initially been unlawful, the illegality had been waived by the landlord as a result of his subsequent unqualified acceptance of rent with full knowledge of the facts.

The second point of interest was the clarification given by the Court to the principles which apply to the acceptance of rent from a statutory tenant after knowledge of a breach of covenant. After considering the case of *Oak Property Co., Ltd.* v. *Chapman*, [1947] K. B. 886, Cohen, L.J. (p. 631) said that what the Court meant in that case was that :—

> " An unqualified acceptance of rent is as much an affirmance of the statutory tenancy as it would be in the case of a common law tenancy, but that, if the acceptance of rent is qualified, it would be a question of fact for the County Court Judge to determine whether that qualified acceptance must be treated in all the circumstances as an unequivocal act of affirmance of the tenancy ".

The distinction is that in the case of a contractual tenancy the landlord cannot qualify his acceptance of rent. It is such an unequivocal act that he cannot obtain the best of both worlds by

saying that he accepts it without prejudice to his rights of forfeiture. In the case of a statutory tenancy, however, he may qualify his acceptance and it is a question of fact whether by doing so he affirms the tenancy.

(Rent Restrictions Guide, 3rd. ed., p. 108.)

Rent Restrictions Acts—husband statutory tenant—subsequent desertion by husband leaving wife in possession—husband's admission of landlord's right to possession ineffective—position of innocent wife.—In *Middleton* v. *Baldock*, [1950] 1 All E. R. 708, a husband who was the statutory tenant of a controlled dwelling-house deserted his wife, leaving her in possession together with an appreciable quantity of his furniture. The landlord brought separate actions for possession against the husband and wife. In the action against the husband he (the husband) admitted the landlord's right to possession. An order for possession was made against him by the County Court Judge, who subsequently made an order for possession against the wife in the action brought by the landlord against her. The landlord did not in either action allege any of the grounds for possession set out in the Rent Acts, but simply that the contractual tenancy had come to an end, and, in the wife's case, that she was a trespasser.

The Court of Appeal held that the order against the husband was wrongly made and must be set aside, as must also the order against the wife. The wife was rightfully in possession on her husband's behalf, and the husband's admission of the landlord's right to possession was ineffective. The landlord was only entitled to an order if he could show some ground for possession set out in the Rent Acts. Sir Raymond Evershed, M.R., approved the following statement by Denning, L.J., in *Old Gate Estates, Ltd.* v. *Alexander*, [1949] 2 All E. R. 822, at p. 825, although he admitted that it probably went beyond what was necessary to decide the present case :—

> " The reason [why the husband cannot give possession] is because the wife has a very special position in the matrimonial home. She is not the sub-tenant or licensee of the husband. It is his duty to provide a roof over her head. He is not entitled to tell her to go without seeing that she has a proper place to go to. He is not entitled to turn her out without an order of the Court : see *Hutchinson* v. *Hutchinson*, [1947] 2 All E. R. 792. Even if she stays there against his will, she is lawfully there, and, so long as she is lawfully there, the house remains within the Rent Acts and the landlord can

only obtain possession if the conditions laid down by the Acts are satisfied ".

It will be noticed that in the present case, as in *Old Gate Estates, Ltd.* v. *Alexander*, some of the husband's furniture remained on the premises, and it might be argued that this was a material factor in both cases. However, the doctrine that a licence to occupy cannot be effectively revoked against an innocent wife seems to have established itself in rent restriction law, thus adding a new complication to be dealt with by County Court Judges. If the wife had been guilty and not innocent, or if the appropriate Court had ordered her to leave, the position would have been different. It is unfortunate that the law on this subject should have become involved in entanglements more suited to the matrimonial jurisdiction.

(Rent Restrictions Guide, 3rd ed., p. 81.)

Rent Restrictions Acts—sub-letting of a part of a dwelling-house furnished with a right to use the kitchen—landlord not entitled to recover possession—Landlord and Tenant (Rent Control) Act, 1949.—In *Baker* v. *Turner*, [1950] 1 All E. R. 834, the House of Lords has reversed the decision of the Court of Appeal which led to the enactment of section 9 of the Landlord and Tenant (Rent Control) Act, 1949. Except for the parties immediately concerned the decision has lost some of its interest as a result of the new statutory provision. There are, however, certain hidden depths in the decision which should not be overlooked.

Although the 1949 Act has a retrospective operation, which was discussed in the two recent cases of *Hutchinson* v. *Jauncey*, [1950] 1 All E. R. 165, and *Jonas* v. *Rosenberg*, [1950] 1 All E. R. 296, it was conceded that the order for possession made in the present case was within the words " anything done " in section 10 of the Act, and was thus preserved from its retrospective operation. The matter had, therefore, to be considered without reference to the 1949 Act.

The Court of Appeal had held, affirming the County Court Judge, that, where the tenant of a dwelling-house within the Rent Acts had sub-let one room furnished with the right to use the kitchen in common with the tenant, the landlord of the dwelling-house was entitled to recover possession, not merely of the sub-let portion, but of the whole dwelling-house. The ground of the Court of Appeal's decision was that, as a result of the *Neale* v.

Del Soto doctrine, the agreement in regard to the kitchen between the tenant and the sub-tenant amounted to a " sharing " which prevented either the sub-tenant from acquiring or the tenant from retaining a *separate* dwelling-house within the meaning of the Acts. The Court of Appeal also held that inasmuch as the room sub-let was sub-let furnished it was for that reason taken out of the protection of the Acts by section 3 (2) (b) of the 1939 Act.

The Court of Appeal's decision has been reversed on both points by the House of Lords, Lord Oaksey dissenting. The House of Lords held, on the first point, that although the grant by the tenant to the sub-tenant of a right to use the kitchen prevented the *sub-tenant*, according to the *Neale* v. *Del Soto* line of decisions, from acquiring a separate dwelling-house, it did not prevent the *tenant* from continuing to occupy a separate dwelling-house. The use of the word " sharing " was criticised by several of their Lordships. The argument that if A shares his kitchen with B, with the result that B has no separate dwelling, it must follow that A on his part has no separate dwelling because he shares with B, was dismissed by the majority as a misleading exercise in formal logic. It was pointed out that a landlord who lets, or a tenant who sub-lets, a part of his house with a superadded right to use the kitchen does not " share " the kitchen. He retains many rights which his tenant (or sub-tenant) does not enjoy—in fact he retains all the rights of control subject only to the specific right which he has granted. Lord Oaksey, in his dissenting judgment, found it difficult to understand why the admitted difference in quantity and quality of the grantor's rights should be material to the question of separateness. There is a good deal of force in his view.

On the second point, the majority held that the sub-let portion was not taken out of the protection of the Acts by section 3 (2) (b) of the 1939 Act, since that section related only to *dwelling-houses* let furnished, *i.e.*, separate dwellings within the meaning of the Acts. It was conceded that the sub-tenant's dwelling was not separate in this sense, owing to the existence of the right to use the kitchen; therefore, section 3 (2) (b) had no application.

As mentioned above, the Legislature anticipated the House of Lords by reversing the Court of Appeal's decision in section 9 of the 1949 Act (see section 9 (a)). Section 9 goes further than the House of Lord's decision, however, in regard to the point about furnished sub-lettings. The House of Lords distinguished *Barrell* v. *Fordree*, [1932] A. C. 676, on the ground that the furnished sub-letting there was of a separate dwelling, whereas in the present case there was no sub-letting of a separate dwelling

as a result of the *Neale* v. *Del Soto* doctrine. Section 9 of the 1949 Act, however, amends the law as determined in *Barrell* v. *Fordree*, since it provides in general terms that a landlord cannot recover possession of a sub-let portion merely because it is let furnished; this covers cases where the sub-let portion is itself a separate dwelling (see section 9 (b)).

The "hidden depths" to which reference was made at the beginning of this note may perhaps be discerned most clearly in the judgment of Lord MacDermott, who says at one point that sections 7, 8 and 9 of the 1949 Act leave it open to the House of Lords to review the *Neale* v. *Del Soto* doctrine if the occasion should arise. At another point he says ([1950] 1 All E. R. 834, at p. 852) that "the validity of that doctrine has not been debated and it is possible—I do not say more—that its effect has not been entirely neutralised for the future by the Act of 1949". When it is realised that the meaning of "living accommodation" in the 1949 Act is not defined except by reference to the law as existing when the Act was passed—*i.e.*, in the series of Court of Appeal decisions—the possibility of a future review of the correctness of these decisions by the House of Lords introduces an element of uncertainty into the construction of the Act.

(Rent Restrictions Guide, 3rd ed., pp. 28–29.)

Rent Restrictions Acts—alternative accommodation—offer of part of premises let to tenant.—In *Parmee* v. *Mitchell*, [1950] 1 All E. R. 872, the Court of Appeal approved and followed the decision in *Thompson* v. *Rolls*, [1926] 2 K. B. 426, where the Divisional Court had held that alternative accommodation within the meaning of the Rent Acts could consist of a part of the tenant's existing accommodation. In *Parmee* v. *Mitchell* a tenant had sub-let part of a dwelling-house. The sub-tenant purchased the whole dwelling-house, and then gave the tenant a notice to quit the whole, coupled with an offer of alternative accommodation consisting of the portion of the house which the tenant had retained for his own occupation. It was held that this portion could properly be treated as alternative accommodation. The decision of the County Court Judge was affirmed, the order as settled by the Court of Appeal being for possession of the whole house, subject to a proviso that, notwithstanding the order for possession, the tenant was entitled to remain in occupation of the portion which he had been occupying.

(Rent Restrictions Guide, 3rd ed., p. 84.)

Rent Restrictions Acts—house and cottage constituting a single dwelling-house.—In *Whitty* v. *Scott-Russell*, [1950] 1 All E. R. 884, the Court of Appeal went further than they did in *Langford Property Co., Ltd.* v. *Goldrich*, [1949] 1 K. B. 511, in holding that two physically distinct entities might together constitute a single dwelling-house within the Rent Acts. The present case differed from *Goldrich's Case* in that one of the two entities, a cottage, was not only physically separate from the other, a house, but was not in fact occupied by the tenant. He only took the cottage because the landlord refused to let the house without it. They were comprised in one tenancy and let as one, and the tenant covenanted to use them as " a private dwelling-house ". There was no internal communication between the house and the cottage. The Court of Appeal held that the complex subject of the letting constituted a dwelling-house to which the Acts applied. In arriving at this decision the Court were influenced by the principle laid down in *Wolfe* v. *Hogan*, [1949] 2 K. B. 194, that the purpose of the letting contemplated in the lease or tenancy agreement is the essential factor in determining the character of the premises. Here there was an express covenant to use the premises as a private dwelling-house only. The Court rejected an argument based on section 3 (3) of the 1939 Act, on the ground that the " dwelling-house " to which that sub-section applied was not the house without the cottage, but the two combined. The garden which was let with the house and cottage was the " land " which was let together with the composite dwelling-house. It had been suggested in argument that the conditions of section 3 (3) were not satisfied because the cottage could not be " premises let together with a dwelling-house ", as " premises " in that context meant premises which were not themeselves a dwelling-house or capable of being one. That argument depended on a misconception as to what was the " dwelling-house " to which section 3 (3) had to be applied —it was not the house alone but the composite entity.

(Rent Restrictions Guide, 3rd ed., p. 20.)

Rent Restrictions Acts—Landlord and Tenant (Rent Control) Act 1949—Rent Tribunals—Informality of procedure.—In refusing applications for *certiorari* and *mandamus* the Divisional Court emphasised, in *R.* v. *Brighton and Area Rent Tribunal, ex p. Marine Parade Estates (1936) Ltd.*, [1950] 1 All E. R. 946, the informality of the procedure of Rent Tribunals under the Landlord and Tenant (Rent Control) Act, 1949. At the hearing before the Tribunal the tenants' counsel made statements on their behalf which were

accepted as accurate, but called no evidence. The landlords called witnesses who were not cross-examined and put in certain figures which the Tribunal did not examine. The landlords sought to quash orders made by the Tribunal, substantially reducing the tenants' rents, on the ground that the Tribunal had failed to act in accordance with natural justice.

Lord Goddard, C.J., pointed out that under the Act and Regulations the Tribunal can decide without hearing either party unless a party states that he wishes to be heard. The Tribunals can act on their own knowledge and their own inspection. Parliament had deliberately provided that the Tribunals should not be bound by the strict rules of Courts of law. The result was that the Tribunal in the present case had not offended against any provision of the Act or the Regulations made under it.

Lord Goddard expressed the view, with which most lawyers will agree, that it would be more satisfactory if there were some method of appeal from the decisions of these Tribunals, which would prevent conflicting decisions and introduce some uniformity of principle into their determinations.

(Rent Restrictions Guide, 3rd ed., p. 70.)

Rent Restrictions Acts—landlords' claim to possession—"conduct which is a nuisance or annoyance to adjoining neighbours"—use of flat for immoral purposes—evidence of nuisance or annoyance.—The landlords in *Frederick Platts Co., Ltd.* v. *Grigor* (1950), 66 T. L. R. 859, may well have felt that the law had proved surprisingly impotent to help them in a case where the facts called for a remedy. The landlords sought possession against a tenant under paragraph (b) of the First Schedule to the 1933 Act, on the ground that the tenant had been guilty of conduct which was a nuisance or annoyance to adjoining occupiers. It was proved that the tenant was a prostitute who solicited men from the open window of a ground-floor flat, and men entered her flat for immoral purposes. There was, however, no actual evidence of nuisance or annoyance to adjoining occupiers. The County Court Judge held that the action for possession failed, in the absence of actual evidence of nuisance or annoyance, as he *could not* infer that such nuisance or annoyance existed. The Court of Appeal were unanimously of opinion that the Judge had misdirected himself in holding that he *could not* draw such an inference, but Bucknill, L.J., and Hodgson, J., thought that the question was essentially one of fact, and that the misdirection was not fatal.

It had not misled the Judge into coming to a wrong conclusion on the question, was there in fact a nuisance or annoyance or not? Denning, L.J., thought that the misdirection merited a new trial, but as he was in the minority the appeal was dismissed. In view of the wording of the Judge's note, there seems much to be said for Denning, L.J.'s view that the misdirection was such as to vitiate the Judge's decision. As Denning, L.J., said, it would be unfortunate if the Courts made it unduly difficult for landlords to ensure that their premises are not used for immoral purposes.

(Rent Restrictions Acts, 3rd ed., p. 87.)

Rent Restrictions Acts—transfer of burden to landlord—increase of cash rent—terms not less favourable to tenant than previous terms—meaning of "burden" and "terms".—In *Asher* v. *Seaford Court Estates, Ltd.* (1950), 66 T. L. R. 943, the House of Lords (Lord MacDermott in part dissenting), affirmed the decision of the Court of Appeal, discussed in these Notes in September, 1949 (p. 385). Lord MacDermott was unable to accept the somewhat Pickwickian meaning which the Court of Appeal and the majority of the House of Lords put upon the expression "burden", namely, "as including a burden which would have had to be borne had an event occurred which in fact never took place". There is a good deal of robust sense in this criticism, but the conception of "contingent burden" which was accepted by the other Law Lords seems to be justified by the underlying principles of section 2 (3) of the 1920 Act. In remitting the action to the County Court Judge the House gave him clearer guidance in regard to the matters to be considered than the Court of Appeal appear to have done. What was to be determined was the monetary value of the additional obligations assumed by the landlord.

(Rent Restrictions Guide, 3rd ed., pp. 55–57.)

Landlord and Tenant Act, 1927, *s.* 18 (1)—*landlord's intention to demolish at end of term—intention must be a firm and not a conditional intention—onus of proof on tenant—evidence of intention.*—As metioned in the note on p. 99 of the March *Conveyancer*, the decision of Lord Goddard, C.J., in *Cunliffe* v. *Goodman*, has been reversed by the Court of Appeal: [1950] 1 All E. R. 720. The Court of Appeal held that the tenant had not discharged the onus which rested on him of showing a firm intention or purpose on

the part of the landlord to pull down the premises at the end of the term. The landlord certainly contemplated doing so, but her intention was conditional upon a number of factors, such as the obtaining of a building licence, the absence of unduly restrictive conditions in the licence and satisfactory arrangements for the provision of finance. In the result the Court of Appeal held that the tenant had not shown that the landlord's project had, to use the language of Asquith, L.J. (p. 725), " moved out of the zone of contemplation—out of the sphere of the tentative, the provisional and the exploratory—into the valley of decision ". Consequently, the tenant was not saved from liability for dilapidations by section 18 (1) of the Landlord and Tenant Act, 1927.

(Woodfall, 24th ed., p. 725 and Cumulative Supplement No. 5, p. 47.)

Landlord and Tenant Act, 1927, *s.* 18 (1)—*diminution in the value of the reversion—threatened compulsory purchase order—effect upon value of the reversion—no diminution due to breach of covenant.*—The decision of Humphreys, J., in *London County Freehold and Leasehold Properties, Ltd.* v. *Wallis-Whiddett and Others*, [1950] W. N. 180, will commend itself to surveyors, who know the sterilising effect upon land transactions of the threat of a compulsory purchase order. At the date when the tenancy terminated in this case there were admittedly breaches of the tenant's covenant to repair. At that date, however, a resolution had been passed by the L. C. C. to make a compulsory purchase order which included the property in question. Under the L. C. C.'s proposals the property would be demolished and the site used for a housing scheme. Although at the material date the resolution had been passed, the order had not been made. Humphreys, J., held that, owing to the imminence of compulsory purchase and its effect upon the market value of the property, there was no diminution in the value of the reversion as a result of the tenant's failure to repair. Section 18 (1) of the Landlord and Tenant Act, 1927, applied, and the landlords' action for damages failed.

(Woodfall, 24th ed., pp. 724–725.)

Lease—forfeiture—suffering premises to be used as a brothel—knowledge of tenant—forfeiture—relief.—In *Borthwick-Norton and Others* v. *Romney Warwick Estates, Ltd.*, [1950] 1 All E. R. 362,

798, lessees, although they had received certain warnings which should have led them to investigate, failed to take any steps to ascertain whether one of their sub-tenants was using a flat as a brothel. She was convicted of so doing and the lessees then determined the sub-tenancy. The freeholders brought an action to forfeit the lease of the premises, which included the flat in question and other flats, on the ground of breach of a covenant not to do or suffer any act which might be an annoyance, damage or disturbance to the landlords or their tenants, and to use the premises as a private dwelling-house only. Hilbery, J., held that the lessees had been guilty of a breach, because, although they did not have actual knowledge of their sub-tenant's activities, they had wilfully blinded themselves to facts and refused to make inquiries in case they should discover the truth. He further held that the case was not one in which the Court would exercise its discretion to relieve against forfeiture. The breach was not one which could be remedied: *Egerton* v. *Esplanade Hotels, London, Ltd.*, [1947] 2 All E. R. 88. It was not the kind of breach for which it was intended that a Court should grant relief. Although the penalty was heavy, involving the forfeiture of a lease of the whole premises which had nineteen years to run, the breach was one for which the penalty ought to be high. On appeal, the Court of Appeal affirmed Hilbery, J.'s decision.

(Woodfall, 24th ed., p. 941.)

Relief against forfeiture—whether breach capable of being remedied—suffering distress to be levied.—In *Hartley* v. *Larkin*, [1950] W. N. 196, Jones, J., held that a tenant's breach of covenant in suffering a distress to be levied on his goods was capable of being remedied, and had in fact been remedied by the payment of rent up to date (it was the landlord who had levied the distress) together with costs. Jones, J. rejected the contention that the breach was incapable of remedy because the levying of the distress on the premises was likely to cause damage to the reputation of the premises. This was, indeed, a somewhat curious argument in the mouth of the landlord who had himself levied the distress. Jones, J., exercised his discretion and granted the tenant relief against forfeiture. There is, perhaps, a slight confusion discernible between remedying the breach of covenant, which was not to suffer a distress, and remedying the non-payment of rent, which gave rise to the distress, by payment thereof and costs.

(Woodfall, 24th ed., p. 937.)

Covenant in a tenancy agreement to grant a further term on request containing the same provisions as the present tenancy "including the present covenant for renewal"—a covenant for perpetual renewal under the Law of Property Act, 1925—*decision of Harman, J., reversed.*—The Court of Appeal have reversed the decision of Harman, J., in *Re Greenwood's Agreement*, [1949] 2 All E. R. 743, referred to in these Notes for December, 1949 (p. 471). The Court of Appeal [1950] 1 All E. R. 436, reject Harman, J.'s distinction between a covenant in express terms for perpetual renewal and a provision containing such words as "including the present covenant for renewal", which carries with it the seeds of its own perpetual reproduction. The Court of Appeal pointed out that it was just this latter form which conveyancers had used to produce perpetually renewable leaseholds, and its efficacy had been recognised in *Hare* v. *Burges* (1857), 4 K. & J. 45. The Court did not in terms overrule, but they distinguished out of existence, the decision of Uthwatt, J., in *Green* v. *Palmer*, [1944] Ch. 328, where he held that the words "including this clause" were effective once only and did not perpetually reproduce themselves. Uthwatt, J., was dealing in that case with a furnished tenancy for a period of six months only. He obviously thought it repugnant to such a tenancy to construe the clause as creating a perpetually renewable leasehold.

As a result, the Law of Property Act, 1922, s. 145 and Sched. XV, para. 5, operated in the present case to vest a term of 2,000 years in the lessee.

(Woodfall, 24th ed., p. 996 and Supplement No. 5, p. 126.)

Lessee's option to purchase freehold reversion—an "incident" of the proprietary interest within the meaning of the War Damage Act, 1943—*lessee's share in value payment thereby increased.*—In *Re Johnson's Application*, [1950] 1 All E. R. 613, the short point was whether an option to purchase the freehold contained in a lease was an "incident" of the lease to be taken into account in dividing the value payment payable in respect of the property between the two "proprietary interests", namely, the freehold and the leasehold interest, under the War Damage Act, 1943. The option to purchase was clearly a valuable right attached to the leasehold interest and the effect of taking it into account in dividing the value payment between the two interests would be considerably to increase the share apportionable to the leasehold interest. Harman, J., held that the option to purchase

was an incident of the proprietary interest (*i.e.*, the leasehold interest) at the date of the war damage. This decision will, it is submitted, commend itself as sound to valuers as well as to lawyers.

(Supplement No. 5 to Woodfall, 24th ed., p. 84.)

Compensation for damage to land during requisition—whether landlord or tenant entitled—meaning of "owner"—Compensation (Defence) Act, 1939.—The short point in *Borthwick-Norton and Others* v. *Collier* (1950), 66 T. L. R. 900, which was decided on an interpleader issue, was whether the landlord or the tenant of property which had been requisitioned was entitled to receive the compensation payable under section 2 (1) (b) of the Compensation (Defence) Act, 1939. Such compensation is payable to the person who is the "owner" of the land at the date of derequisition. "Owner" is defined in the Act as "the person who is receiving the rack rent of the land, whether on his own account or as agent or trustee for any other person, or who would so receive the rack rent of the land if it were let at a rack rent". The main point of principle argued in the case was whether this means that the "owner" must be the person who is receiving the rack rent, as defined in the Public Health Act, 1936, at the date of derequisition. The definition of "rack rent" in section 343 of the latter Act is as follows:—

> "'rack rent' in relation to any property means a rent which is not less than two-thirds of the rent at which the property might reasonably be expected to let from year to year, free from all usual tenant's rates and taxes, and tithe rentcharge (if any), and deducting therefrom the probable average annual cost of the repairs, insurance and other expenses (if any) necessary to maintain the same in a state to command such rent."

The tenant brought forward evidence, which, however, Hilbery, J., did not accept, that if the property had been newly let at the date of derequisition the rent obtainable would have been much higher than the rent payable under the existing lease. He sought to argue from this that the freeholder was not the "owner" within the 1939 Act at the material date, as he was not then receiving the rack rent. He then argued that the second part of the definition of "owner" came into play, with the result that he (the tenant) was the "owner", as being the person who would receive the rack rent if the land had been let at a rack rent.

In other words, he sought to prove that he was the "owner" because he was sitting at a profit rent. Hilbery, J., rejected this contention. Even if he had accepted the evidence about the profit rent he would not have decided that the tenant was the "owner". He took the view that if the letting was *originally* made at a rack rent the fact that market conditions had changed since then, with the result that the rent had ceased to be the rack rent at the date of derequisition, did not prevent the person receiving that rent from being the "owner". To put it shortly, Hilbery, J., held that "rack rent" in this context means the rack rent at the date when the letting was made, not the rack rent at the date of derequisition. It is clear that to have held otherwise would have been to strain the construction of the statute and to produce difficulties.

Doctrine of encroachments by tenants upon adjoining land enuring for the benefit of their landlords as an accretion to the holding—effect of conveyance of the accretion by the landlord to a third party and conveyance of the holding to the tenant.—It has long been laid down that an encroachment by a tenant made from the adjoining waste during his tenancy is *prima facie* for the benefit of the tenant during the term and afterwards for the benefit of the landlord; in other words the tenant acquires a leasehold interest in the encroachment and the reversion enures to his landlord. Similarly, an encroachment by the tenant upon adjoining land of his landlord, after occupation by the tenant for more than twelve years, cannot be recovered by the landlord during the term, but is deemed to have been occupied by the tenant as part of the holding, so as to be recoverable by the landlord at the end of the term. In *King* v. *Smith*, [1950] 1 All E. R. 553, the weekly tenant of a house encroached upon an adjoining strip belonging to his landlord and remained in continuous and exclusive possession of it for more than twelve years. The effect of this was to leave the landlord with the freehold reversion of the strip but to vest in the tenant a leasehold interest in it co-terminous with his tenancy of the house. The question arose as to the legal position when the landlord sold the strip to a third party and then sold the reversion in the house to the tenant. The tenant claimed that the freehold interest in the strip as well as in the house had vested in him. The Court of Appeal rejected this contention. At the date when the landlord sold the strip to a third party he was entitled to the freehold reversion in it. Roxburgh, J. (sitting as a member of the Court of

Appeal) seemed to hold that so far from the erstwhile tenant acquiring the freehold interest in the strip his leasehold interest in it was automatically extinguished. Cohen, L.J., suggested that the purchaser of the strip might have to give notice determining the leasehold interest in it. The latter view seems in law to be more correct.

(Woodfall, 24th ed., pp. 1010–1011.)

Agricultural Holdings Act, 1948—*notice to quit—effect of award by arbitrator under section 5 during currency of notice to quit.*—The reasoning of Vaisey, J., in *Hollings* v. *Swindell*, so far reported only in the *Estates Gazette* (April 1, at p. 269) is a little hard to follow. During the currency of a valid and effective notice to quit (consent to the notice had been given in accordance with the Act by the County Committee and the Agricultural Land Tribunal) an arbitrator appointed under section 5 issued his award, which set out the terms of a yearly tenancy. Vaisey, J. held that the effect of the award was to invalidate the notice to quit. Fuller comment must await a more satisfactory report, but it is difficult to reconcile the judgment with the scheme of the Act. The task of the arbitrator under section 5 is to specify the terms of the existing tenancy; the object of section 5 is to secure that agreements are reduced to writing. It would seem odd if the section could operate to interfere with a valid notice to quit.

(Jackson's Agricultural Holdings, 10th ed., p. 111.)

THE LIBRARY

EMMET ON TITLE (13th Edition). Edited by J. GILCHRIST-SMITH, Solicitor. Volume 2. Solicitors' Law Stationery Society. £3 10s. net.

This Volume completes the thirteenth edition of *Emmet*, and will be welcomed by the profession. If this work were sold on the footing of "Money back if not satisfied" it would be a very unreasonable purchaser who desired to take advantage of the option to return the work. It contains a wealth of useful and reliable information.

The Second Volume contains fifteen chapters, dealing with such important matters as Settled Land, Leases and Tenancies, with a

special chapter on Agricultural Tenancies, Mortgages, Town and Country Planning, Compulsory Purchases and Requisitioning, Wills and Intestacies, Trusts and Trustees; and also a useful outline of Registered Land, prepared particularly for the benefit of provincial solicitors, whose experience in that branch of conveyancing practice is not considerable, except, of course, in the few places outside London or Middlesex where registration is compulsory.

So far as this reviewer has been able to test the work, it may be said that the present editor has fulfilled his task with skill, and much useful information not normally to be found in a work on conveyancing is included.

The chapter on Town and Country Planning should be of great assistance to the practitioner. The inclusion of various important Orders made under the Town and Country Planning Act, 1947, is a most useful feature, as probably few solicitors have copies of these Orders in a place where they can immediately be found.

As it is the declared object of the editor to make the book as useful as possible, the following points are mentioned by way of suggestion in connection with a future edition.

The question When does a purchaser acquire an equitable right to production of deeds? might be discussed (p. 635). This point often arises in practice, and although the answer may not be entirely clear, a consideration of the authorities might be of assistance to practitioners.

Page 690 : It is difficult to follow the reference to section 51 (1) of the Judicature Act, 1925 : possibly a reference to section 155 of that Act, replacing section 13 of the Administration of Estates Act, 1925, was intended. If so, it would possibly have been better to have followed more closely the wording of the section.

At p. 1134 reference is made to *Re Milner and Organ's Contract* (1920), 89 L. J. Ch. 315, but no reference is made there to the more recent cases of *Re Spencer and Hauser's Contract*, [1928] Ch. 598, and *Green* v. *Whitehead*, [1930] 1 Ch. 38, with the result that a wrong impression of the legal position may be created. However, on turning to Volume 1, p. 110, it will be seen that both those cases are mentioned, and the point is more fully discussed. Incidentally, the reference at p. 110 of Volume 1 to the Weekly Notes report might now be replaced by reference to the report, as above, in the Law Reports.

It should be added that the Index is good and the Table of Cases contains the references, so far as can be judged, to all available reports of the various cases which are cited, including reference to the official report of *Re Spencer and Hauser*.

To summarise this review, it may be said that this reviewer has nothing but praise for the manner in which the new editor has performed his task, and he has little doubt that both volumes will be in constant use.

E. O. W.

A REFERENCER TO PLANNING LAW AND PRACTICE. By H. CROSSLEY and R. N. HUTCHINS, Solicitors. Sweet & Maxwell. 3s. 6d. net.

At first there was the Common Law. Then there came the Statute Law. Later came the Statutory Rules and Orders, and, later still, the Statutory Instruments. To these were added, in due time, the Official Explanatory Memoranda published, generally, in conjunction with Official Circulars explaining the Official Explanatory Memoranda. In addition, there have come the Text Books explaining the explanations of the foregoing and unravelling (or endeavouring to do so) the law in general. From time to time there have also been added the Articles which deal *ad hoc* with intricate points of special interest.

Amongst all these things it is easy to get lost entirely, but even when a man does contrive to keep some of his bearings it is easy for him to forget to look at something which he ought to have looked at with the result that his standing is not as secure as he thinks it is.

Accordingly, this *Referencer to Planning Law and Practice* is a welcome *vade mecum* for those who have to wander through the jungle of Acts, regulations, explanatory memoranda, official circulars, textbooks and articles which have appeared so prolifically in connection with the subject of planning law and practice. The *Referencer* is the signpost *par excellence*, for it points the way to section, statutory instrument, circular or article dealing with a variety of points likely to arise in connection with town planning law, and listed in the *Referencer* under no less than seventy-nine separate headings.

It may well be said in these days that the art of the lawyer is not so much knowing the law as knowing where to find it. With this *Referencer* there should be little excuse for not finding *the way* " to Planning Law ". Understanding it is, however, a somewhat separate problem.

D. H.

THE LAW OF MORTGAGES. Second Edition. C. H. M. WALDOCK. Stevens & Sons, Sweet & Maxwell. xxviii and 441 pp. £1 15s.

It is difficult to over-praise Professor Waldock's textbook which is now extended to mortgages of all kinds of property, both real and personal. The subject of mortgages is veteran and important, with few drastic changes, and lends itself very well to definitive treatment. The learned author shows at one and the same time a useful practical sense and a refined academic grasp. The book abounds in useful hints for the security of the parties to a mortgage transaction, without failing to appreciate such academic problems as the nature of the mortgagor's equity in the long term of years. Full discussion, with reasons, takes the place of the usual arid formal statements of law encountered in books of this size. It would be presumptuous to suggest any major modifications of this thoughtful and lucid work. The only minor points which suggest themselves to the present reviewer might be the following : it might be added, in " section " 60, that the possession of a receiver is that of the mortgagor, so as to prevent time running against the mortgagor, though the receiver is appointed by the mortgagee, a useful practical point; consolidation of registered charges under the L. R. A., 1925, is alluded to, but a short paragraph would certainly fit the comprehensive scheme of the book, explaining L. R. A., s. 25 (3), and rule 154; difficulties sometimes occur under the transitional provisions, in the case of the vesting of head-terms in mortgagees of leaseholds, and here the author would do a service by discussing the point (all these points merely reflect the present reviewer's preferences on the subject). The only possible criticism of the text seems to be the omission of a reference to L. P. A., 1925, s. 153. Professor Waldock refers (p. 344) to the fact that a mortgagee may enlarge under L. P. A., s. 88 (3), where he has acquired title by adverse possession, and that foreclosure vests the reversion in him. L. P. A., s. 153 (3), might supply a remedy where a redemption action is dismissed, as it enables the mortgagee to enlarge his term where the right of redemption is barred, but does not refer to adverse possession. This point is worth discussion. One or two cross references might be added, between pp. 42 (89) and 44 (100), 292 (42) and 295 (53). The form " marshall " looks wrong in section 77 of the book, and " over-draught " at the top of p. 145. A misleading misprint is " change ", for " charge ", at p. 158 (30). Minor misprints occur on pp. 3 (in many ways), 25 (32) (conveyancers), 138 (equitable mortgagee), 408, end (interests), 410, top (title deeds).

A. K. R. K.

THE RENT ACTS. By R. E. MEGARRY, M.A., LL.B., Barrister-at-Law. Fifth edition. London : Stevens & Sons, Ltd. 1950. xlix and 442 pp. £1 10s.

All serious students of the Rent Restrictions Acts will welcome a new edition of this admirable book, the reputation of which continues to increase, and the authority of which has been enhanced by the approval with which it has been quoted on more than one occasion by the Court of Appeal since the last edition was published. It is rather a sobering thought that the previous edition was published only in 1949, and that, despite this brief lapse of time, it has become necessary to rewrite a substantial part of the book and to add 150 pages.

There is no need at this stage to commend *Megarry* to the profession. The book's clarity, accuracy and depth of scholarship are now well known. Among the new features of the latest edition is a most interesting discussion of the issues raised by the Scottish case of *Pender* v. *Reid*, 1948 S. C. 381, in relation to the rule regarding partial business user exemplified in *Vickery* v. *Martin*, [1944] K. B. 679. Megarry's reconciliation on pp. 39 and 50 is worth careful study.

A good deal of the additional material in the new edition is due to the passing of the Landlord and Tenant (Rent Control) Act, 1949, which the author expounds with his usual acuteness. One statement requires correction as a result of the two recent decisions of *Hutchinson* v. *Jauncey*, [1950] 1 All E. R. 165, and *Jonas* v. *Rosenberg*, [1950] 1 All E. R. 296, namely, the statement at the foot of p. 34 as to the effect of section 10 of the Act in regard to proceedings begun before June 2, 1949. The author's view that an application may be made under the 1949 Act in respect of premises registered under Defence Regulation 68CB, during the time when the premises are so registered, has obvious support in the wording of the Act, but the contrary view is perhaps not unarguable.

One small misprint has been noticed—the lethal effect which Cohen, L.J., is alleged to have attributed to logic in the second line of the third paragraph on p. 135.

The fifth edition of Megarry's *Rent Acts* can be unreservedly recommended to all practitioners.

J. MUIR WATT.